Parliament of the Commonwealth of Australia

Australian Content Standard for Television & Paragraph 160(d) of the *Broadcasting Services Act 1992*

Report by the Senate Environment, Communications, Information Technology and the Arts Legislation Committee

February 1999

ISSN 1441-9920

This document was produced from camera ready copy prepared by the Senate Environment, Communications, Information Technology and the Arts Legislation Committee and printed by the Senate Printing Unit, Parliament House, Canberra

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS LEGISLATION COMMITTEE

MEMBERSHIP

1. Members

Senator A Eggleston, Chair (LP, WA)

Senator M Bishop, Deputy Chair (ALP, WA)

Senator L Allison (AD, VIC)

Senator the Hon N Bolkus (ALP, SA)

Senator M Payne (LP, NSW)

Senator J Tierney (LP, NSW)

2. Substitute Members

Senator N Stott Despoja (AD, SA) to substitute for Senator Allison for matters relating to Information Technology

3. Participating Members

Senator E Abetz (LP, TAS)

Senator A Bartlett (AD, QLD)

Senator R Boswell (NPA, QLD)

Senator V Bourne (AD, NSW)

Senator B Brown (AG, TAS)

Senator D Brownhill (NPA, NSW)

Senator G Campbell (ALP, NSW)

Senator K Carr (ALP, VIC)

Senator M Colston (IND, QLD)

Senator H Coonan (LP, NSW)

Senator B Harradine (IND, TAS)

Senator M Lees (AD, SA)

Senator K Lundy (ALP, ACT)

Senator D Margetts (GWA, WA)

Senator the Hon C Schacht (ALP, SA)

4. Committee Secretariat

Ms Roxane Le Guen, Secretary

Mr Geoff Dawson, Principal Research Officer

Ms Tara Ducker, Research Officer

S1.57, Parliament House

Canberra ACT 2600

Ph 02 6277 3626

Fax 02 6277 5818

Email: erca.sen@aph.gov.au

TERMS OF REFERENCE

On 3 July 1998 the Senate resolved:

That the following matter be referred to the Environment, Recreation, Communications and the Arts Legislation Committee for inquiry and report by the first sitting day after 31 October 1998:

The implications of retaining, repealing or amending paragraph 160(d) of the Broadcasting Services Act 1992, having regard to:

(1) the meeting of Australia's cultural objectives;

(2) the implications for Australia's international obligations and their implementation, for the conduct of its international relations, and for its international trade and trade policy interests;

(3) the object set out in paragraph 3(e) of the Broadcasting Services Act 1992;

(4) the role and functions of the Australian Broadcasting Authority in relation to the setting and the administration of Australian content standards; and

(5) the Australian Broadcasting Authority's draft revised Australian content standard for free to air commercial television

TABLE OF CONTENTS

MEMBERSHIP III

TERMS OF REFERENCE V

RECOMMENDATIONS VIII

CHAPTER 1 1

BACKGROUND TO THE INQUIRY 1

Introduction 1

The Inquiry 2

The legal framework for the Australian Content Standard 3

The Australian Content Standard 4

CHAPTER 2 8

IMPLICATIONS OF RETAINING SECTION 160(D) OF THE BROADCASTING SERVICES ACT 1992 8

The ABA's response: the draft new Australian Content Standard 8

Australian Content Quotas on Television 10

Industry Reaction to the new Draft Australian Content Standard 11

Fears of an influx of New Zealand programs 12

Effect of including New Zealand Programs on the Subquotas 15

Problem of subsidies to New Zealand TV programs 23

Committee comment 26

International Implications of Retaining 160(d) 27

CHAPTER 3 33

IMPLICATIONS OF REPEALING PARAGRAPH 160(D) OF THE BROADCASTING SERVICES ACT 1992 33

Should paragraph 160(d) be repealed? 33

APPENDIX 1 - OVERSEAS LOCAL CONTENT RULES 38

APPENDIX 2 - CULTURAL EXEMPTIONS IN INTERNATIONAL TRADE AGREEMENTS 40

APPENDIX 3 - NETWORK COMPLIANCE WITH THE AUSTRALIAN CONTENT STANDARD 42

APPENDIX 4 - HOURS OF NEW ZEALAND PROGRAMS ON NEW ZEALAND TELEVISION 44

APPENDIX 5 - EXPENDITURE BY COMMERCIAL TELEVISION ON AUSTRALIAN PROGRAMS 45

APPENDIX 6 - NEW ZEALAND ON AIR SUBSIDIES TO TELEVISION PRODUCTION 46

APPENDIX 7 - COMPARISON OF AUSTRALIAN AND NEW ZEALAND SUBSIDIES TO TELEVISION PRODUCTION 47

APPENDIX 8 - LIST OF SUBMISSIONS 49

APPENDIX 9 - WITNESSES WHO APPEARED BEFORE THE COMMITTEE ... 51

AUSTRALIAN DEMOCRATS 54

Statement to the ECITA committee report into Section 160(d) of the Broadcasting Services Act. 54

MINORITY REPORT BY ALP SENATORS ON AUSTRALIAN CONTENT REGULATION FOR COMMERCIAL TELEVISION BROADCASTERS 58

1. Introduction. 58
2. ABA amendment of Content Standard. 58
3. Amendment of the Broadcasting Services Act 1997. 59
4. Conclusion. 59

APPENDIX 10 - COPY OF ADVICE ON SIDE LETTER FORM THE ATTORNEY GENERAL'S DEPARTMENT 61

RECOMMENDATIONS

Recommendation 1

The Committee recommends that the Australian Broadcasting Authority (ABA) state in the introduction to its new Australian Content Standard that Australian culture and New Zealand culture are different from each other. They each have their own distinct characteristics and are not interchangeable. The ABA must make it clear that if the new Australian Content Standard gives special status to New Zealand productions the aim is solely to make the Standard consistent with Australia's obligations under the CER Protocol.

Recommendation 2

The Committee recommends that, in the event of the ABA's new Australian Content Standard being implemented, its effects on the number of New Zealand programs broadcast as part of various television quotas should be closely monitored by the ABA, with a view to taking remedial action if the ABA finds that object 3 (e) of the *Broadcasting Services Act 1992* is no longer being met. The ABA should report to the Minister after 2 years of operation of any new Standard.

Recommendation 3

The Committee recommends that section 160(d) of the *Broadcasting Services Act 1992* be amended to require the ABA to perform its functions having regard to Australia's obligations under any convention of which the Minister has notified the ABA in writing.

Recommendation 4

The Committee recommends that on the question of New Zealand/third party co-productions, the government should negotiate with the New Zealand government with a view to exchanging side letters to the CER Services Protocol to clarify both countries' understanding of the meaning and application of the CER Services Protocol in relation to New Zealand/third party co-productions. The side letter should make it clear that New Zealand/third party co-productions would not be eligible for the purposes of the Australian Content Standard quotas.

Recommendation 5

The Committee recommends that, in accordance with the Canadian precedent, an exclusion clause for cultural industries should be inserted in all future trade agreements with other countries

Recommendation 6

The Committee recommends that the Department of Foreign Affairs and Trade examine the government's obligations under other treaties to which Australia is a party to, with a view to the government beginning negotiations to remove any possible applications to cultural industries.

Recommendation 7

The Committee recommends that the government approach the New Zealand government to seek an amendment to the Closer Economic Relations (CER) Protocol which would insert a "cultural industries clause" to exempt services relating to cultural industries from the Protocol.

CHAPTER 1

BACKGROUND TO THE INQUIRY

Introduction

1.1 Australian content quotas for commercial television broadcasters were first introduced in 1961 and have been progressively increased over the past 37 years, with strong support from the general public and bipartisan political support. A recent study of Australian content regulation found continuing widespread support for the current level of domestic programming on television and moderate support for an increase in local content.[1]

1.2 Several features of television conspire to create the need for regulation. Firstly, television is a most important medium for reflecting the tastes, concerns and aspirations of a society and as such, it is the main means of transmitting that society's culture through the 'stories' portrayed through the medium. Australians watch, on average, 3 hours and 13 minutes of television per day. As noted in the government's Explanatory Memorandum for the bill for the *Broadcasting Services Act 1992* -

> '…it is widely accepted that television is a powerful medium with the potential to influence public opinion, and that television has a role to play in promoting Australian's cultural identity…It is intended [in making an Australian content standard under section 122] that commercial television broadcasters broadcast Australian programming which reflects the multicultural nature of Australia's population, promotes Australian cultural identity and facilitates the development of the local production industry.'[2]

1.3 The implication of such statements is that transmission of Australian culture through television should be encouraged beyond what the private market would supply; or at the least it is too important a matter to be left to the vagaries of the unfettered market.

1.4 Secondly, the cost structure of television production is distinctive in that the fixed costs of producing programs and maintaining transmission facilities are relatively high but, once the fixed costs have been incurred, the extra marginal cost of selling a program in another market, or broadcasting it to extra viewers, is very low. Thus there is a strong incentive to show a program in as many places as possible.

1.5 Thirdly, the traditional structure of the television production industry is such that producers typically aim to recoup all or most of their costs in their primary national markets. Secondary (foreign) markets are then supplied at prices that need to

---

1 *Cultural Regulation of Australian Television Programs*, Bureau of Transport and Communications Economics occasional paper 114, quoted in Papandrea F, *Trans-Tasman Blues: Australian Content on Television*, 1998, unpublished, p 3

2 DOCITA, Submission no. 32 p 2 quoting Explanatory Memorandum to *Broadcasting Services Bill 1992*

be little more than marginal cost.[3] This means that foreign programs can usually be bought for prices much cheaper than local programs. For example:

> 'In the USA, drama programs typically cost $US1.2 million per hour to produce. There programs are sold to US networks for $US800, 000 per hour, and subsequently sold around the world at whatever price the secondary market will stand. This can be as little as a few hundred dollars… a top-rating US drama still only costs Australian broadcasters A$30,000 to $70,000 an hour. This far less than the price broadcasters must pay for Australian drama programs. These range from a relatively low cost for series and serial (approximately $50,000 to $200,000 per hour) to considerably higher licence fees (approximately $200,000 to $400,000 per hour) for adult telemovies and mini-series…'[4]

1.6 The result is that '…despite the popularity of Australian programs, the comparative cost of making local, versus buying imported, programs means that ratings alone are insufficient to ensure high levels of Australian content on commercial television.'[5] In other words even if a foreign program rates poorly, it could still be an attractive proposition for a broadcaster (particularly outside prime time) if it can be bought very cheaply.

The Inquiry

1.7 The Senate referred the present inquiry to this Committee on 3 July 1998. The terms of reference are:

> The implications of retaining, repealing or amending paragraph 160(d) of the Broadcasting Services Act 1992, having regard to:
>
> (1) the meeting of Australia's cultural objectives;
>
> (2) the implications for Australia's international obligations and their implementation, for the conduct of its international relations, and for its international trade and trade policy interests;

---

3 This behaviour does not appear to be economically rational. In a competitive free market one would expect A, selling programs in market B, to seek prices as high as possible while still undercutting prices for local programs in market B; conversely, prices for A's programs in market A would drop under pressure from imports from B, and A would rely on increased income in market B to make up the difference. Thus in each market prices for local versus foreign programs would reach a relationship determined mainly by their relative appeal to viewers and advertisers. Some evidence to the committee implies this: see T Branigan (FACTS), evidence 4 December 1998 p 30: 'Over a decade *Neighbours* went from a situation where its entire production cost was recovered in Australia to a situation now where, I suspect, a relatively small proportion of its production cost is recovered in Australia.' Submissions did not offer any explanation for the reported actual behaviour.

4 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998, p 22

5 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998, p 23

(3) the object set out in paragraph 3(e) of the Broadcasting Services Act 1992;

(4) the role and functions of the Australian Broadcasting Authority in relation to the setting and the administration of Australian content standards; and

(5) the Australian Broadcasting Authority's draft revised Australian content standard for free to air commercial television

1.8 The Committee received 35 submissions (see Appendix 8) and held one public hearing in Canberra (see Appendix 9). The report of the inquiry, originally planned for the first sitting day after 31 October 1998, was delayed because of the general election on 3 October 1998.[6]

1.9 The need for a review of the implications of section 160 (d) of the *Broadcasting Services Act 1992* through a Senate Committee inquiry arose following a ruling of the High Court of Australia that the current Australian Content Standard developed by the Australian Broadcasting Authority (ABA) and applying to free-to-air commercial television broadcasters, was in breach of the *Broadcasting Services Act 1992* (*BSA*).

The legal framework for the Australian Content Standard

The Objects of the Broadcasting Services Act 1992

1.10 The *Broadcasting Services Act 1992* has as one of its objects -

3 (e): to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity.

1.11 Section 122 of the Act requires the ABA to

122(1)(a) determine standards that are to be observed by commercial broadcasting licensees…
…
122(2) Standards under subsection (1) for commercial broadcasting licensees are to relate to: (a) programs for children; and (b) the Australian content of programs.
…
122(4) Standards must not be inconsistent with this Act or the regulations.

1.12 Commercial broadcasting licensees must comply with the standards as one of the conditions of their licenses (*BSA*, schedule 2 section 7(1)(b)). As well, under paragraph 160(d) of the Act -

6 At the time of the reference the committee was called the Environment, Recreation, Communications and the Arts Legislation Committee. Formally the reference had to be renewed in the new (39th) parliament. This was done on 30 November 1998.

> **160** The ABA is to perform its functions in a manner consistent with:
> …
> (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

The issue in the Project Blue Sky High Court case was which of section 122 and section 160(d) of the *BSA* took priority.

1.13 Under the requirements of the *Broadcasting Services Act 1992* (*BSA*) as stated in the above paragraphs, the Australian Broadcasting Authority (ABA) is required to make a standard relating to the Australian content of television broadcasting (*BSA*, section 122). The current Australian Content Standard requires broadcasters to show Australian programs at least 55 per cent of the time between 6am and midnight. 'Australian' is defined according to criteria that are specified in the Standard. An outline of the current Standard follows:

The Australian Content Standard[7]

1.14 The present Australian Content Standard under section 122 of the *BSA* (the one that the High Court found was unlawful) has been in force since 1 January 1996. In brief, each free-to-air commercial broadcaster must -:

- show Australian programs at least 55 per cent of the time between 6am and midnight (tallied over a year);
- show a minimum quota of first release Australian drama in prime time (5pm-midnight). Programs are given a point score weighted for the perceived quality of the program type (for example, one-offs such as a telemovie get more points per hour than a serial). The quota of 225 points per year represents somewhere between 80 and 258 hours of programming per year, depending on what mix of program types a broadcaster chooses.
- show at least 10 hours of first release Australian documentaries each year;
- show at least 130 hours of Australian pre-school programs each year;
- show at least 260 hours of children's programs each year, of which at least 50 per cent must be Australian; at least 32 hours must be first release Australian children's drama; and at least 8 hours must be repeat Australian children's drama.

1.15 A program is 'Australian' if -

- it has a final certificate under section 124ZAC (Division 10BA of Part III) of the *Income Tax Assessment Act 1936*; or

---

7 Information in this section is largely drawn from Department of Communications, Information Technology and the Arts, Submission no. 32, and Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998.

- it is made pursuant to a official intergovernmental agreement between Australia and another country; or
- it satisfies a 'creative elements' test detailed in the Standard, which requires certain of the personnel involved in production to be Australians.

Australia and New Zealand CER Agreement

1.16 In 1983 Australia and New Zealand made a Closer Economic Relations Trade Agreement (CER). On 18 August 1988 the two countries made a Protocol extending the agreement to trade in services as well as goods.[8] The parts of it most relevant to the present report are:

> **Article 4: Market Access:** Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them.
>
> **Article 5: National Treatment:** Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them.

1.17 Annexed to the Protocol are 'negative lists' of matters that the parties wished to exclude. Australia's negative list, for example, includes 'limits on foreign ownership as set out in the *Broadcasting Act 1942*' - but does not make any reference to the content of television programs. Either party can remove matters from its negative list, but cannot add to it.

The High Court case

1.18 In December 1995 (on the day the ABA's new Standard was determined, Project Blue Sky Inc., a company representing the New Zealand film and TV industry and five New Zealand film production companies, commenced proceedings in the Federal Court of Australia to have the ABA's decision to determine the Standard reviewed. The challenge was made on the grounds that, because the Standard was inconsistent with the Closer Economic Relations (CER) Protocol agreed to by Australia and New Zealand, it breached paragraph 160(d) of the *Broadcasting Services Act 1992*, which requires the ABA to perform its functions in a manner consistent with Australia's obligations under international agreements.

1.19 Davies J made a declaration that the Standard was "invalid to the extent to which it fails to be consistent with the Protocol" and ordered the Standard to be set aside from 31 december 1996 unless revoked or varied by the ABA. [9] The ABA appealed Davies's decision to the Full Court of the Federal Court. The Full Court of

---

8 Australian Treaty Series, 1988 no. 20

9 *Project Blue Sky vs Australian Broadcasting Authority*, unreported ,19 July and 26 August 1996

the Federal Court found in favour of the ABA, finding that paragraph 122(2)(b) and paragraph 160(d) of the *BSA* were 'irreconcilable', and that the special provision in section 122 must prevail over paragraph 160(d).[10]

1.20 Project Blue Sky sought and was granted leave to appeal to the High Court of Australia. In the High Court appeal, it was common ground between the main parties that the Australian Content Standard *is* inconsistent with Australia's obligations under the CER Protocol, in that it discriminates against New Zealand programs, as compared with Australian programs, in the Australian television market.[11] The question for the court was whether the standard was 'lawful' in terms of the *BSA* although it was admittedly inconsistent with the CER.

1.21 The ABA had argued in the Federal Court that section 122 of the *BSA*, read with section 3(e), required it to make a standard along the lines that it did, and that section 122 took priority over paragraph 160(d).[12] The ABA had considered the problem and reached this conclusion before making the present standard: in a 1994 discussion paper it said:

> '…counsel was asked to advise on the duties to be performed by the ABA pursuant to s122…the ABA is now of the view that it is beyond the scope of the power implied by virtue of s122 to provide that the meaning of an 'Australian' extends to a person who is a New Zealander.'[13]

1.22 The High Court rejected the finding of the Full Court of the Federal Court that the special provision in section 122 must prevail over paragraph 160(d).[14] It concluded that a section 122 standard 'relating to' the Australian content of programs does not demand favouritism towards Australian programs and can also relate to other matters [for example, New Zealand programs]; accordingly the ABA can, and therefore should, make a standard consistent with both section 122 and paragraph 160(d).

> 'It is of course true that one of the objects of the Act is "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity" (s3(e)). But this object can be

---

10 *Australian Broadcasting Authority vs Project Blue Sky Inc. & ors*, 12 December 1996, (1996) 71 FCR 465

11 Some third parties intervened in the case as *amici curiae*. Not all of them agreed that the present standard is inconsistent with international obligations. See K Ireland (Australian Film Commission), Evidence, 4 December 1998 p 25.

12 This argument relies on two underlying principles: 1. where two parts of a statute are inconsistent (as the ABA argued for s122 and s160(d)), the more specific takes priority over the more general; 2. Australia's international treaties are not binding in Australian domestic law 'of their own motion': rather, to enforce a treaty in Australia appropriate Australian laws must be made. In the absence of these it is quite possible for an action to be lawful in Australian law although inconsistent with Australia's treaty obligations.

13 In the Federal Court, *Project Blue Sky & ors vs Australian Broadcasting Authority*, No. NG 807 of 1995 FED No. 600/96 Broadcasting, 19 July 1996, para. 11

14 *Australian Broadcasting Authority vs Project Blue Sky Inc. & ors*, 12 December 1996, (1996) 71 FCR 465

> fulfilled without requiring preference to be given to Australian programs over New Zealand programs. Thus, the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian or New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time. Such a standard would relate to the Australian content of programs even though it also dealt with the New Zealand content of programs. In any event, the existence of the object referred to in s3(e) cannot control the dominating effect of s160(d).'[15]

1.23 The High Court found therefore that the current Australian Content Standard is unlawful in that it breaches paragraph 160(d) of the *Broadcasting Services Act 1992* which requires the ABA to perform its functions in a manner consistent with Australia's international treaty obligations. [16]

1.24 Accordingly the ABA was obliged to review the standard to make it lawful. In July 1998 the ABA released for public comment a discussion paper which canvassed various options for making a lawful Australian Content Standard.[17] On 13 November 1998 the ABA released for public comment a draft new Standard.[18] The most significant change is that New Zealand programs will qualify for Australian content quotas equally with Australian ones.

---

15 *Project Blue Sky vs Australian Broadcasting Authority*, 28 April 1998, HCA 28; (1998) 153 ALR 490, at para. 90

16 *Project Blue Sky vs Australian Broadcasting Authority*, HCA 28 (28 April 1998). Strictly speaking the judgment related only to clause 9 of the standard - the clause setting the general 55 per cent quota. But the same logic applies to the standard as a whole.

17 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1988

18 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1988

CHAPTER 2

IMPLICATIONS OF RETAINING SECTION 160(D) OF THE BROADCASTING SERVICES ACT 1992

2.1 As long as section 160(d) of the *Broadcasting Services Act 1992* is retained in its present form, the Australian Broadcasting Authority (ABA) has little choice in the wake of the High Court's "Project Blue Sky" decision, but to devise a new Australian Content Standard to replace the one that had been found to be "unlawful". The ABA'c challenge is to accommodate Australia's international obligations as required by the provisions of the Act, while still attempting to support the cultural object set out in section 3(e) of the *BSA.* The latter requires free-to-air commercial TV channels to promote a sense of Australian identity, character and diversity.

The ABA's response: the draft new Australian Content Standard

2.2 The ABA met that challenge by first releasing a Discussion Paper canvassing various options in July 1998 and inviting comments on its proposals. This was followed by the release of the draft of its proposed new Australian Content Standard in November 1998. The most significant change in the new Standard is that 'Australian program' is replaced throughout by 'Australian or New Zealand or Australian/New Zealand' program. An Australian program is one which satisfies the Australian creative elements test (ie certain personnel involved must be Australians); a New Zealand program is one which satisfies an identical New Zealand creative elements test; an Australian/New Zealand program is one whose personnel between them are Australians or New Zealanders.[1]

2.3 The ABA made other changes as a result of its consideration of the likely impact of including New Zealand programs.[2] They are -

- The subquota for first-release Australian documentaries is increased from 10 hours to 20 hours per year, 'in recognition of the vulnerability [to replacement by New Zealand programs] of the minimal 10 hour obligation under the current quota'. The ABA considered similar arguments in relation to the subquotas for drama and children's drama, but does not propose any change to these, as it regards the risks as less severe: '…it is premature to increase these subquotas for drama and children's drama at the introduction of a new standard.'[3]

---

1 This is the effect though not the overt structure of the draft standard. The draft standard is structured to retain 'Australian' content as its default topic, but adds a section to the effect that New Zealand, Australian/New Zealand programs or Australian official co-productions can be used to reduce Australian content quota obligations.

2 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, p 3

3 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D p 7-9

- The 32 hour quota for first release Australian children's drama will only be satisfied by programs for which the licence fee is at least $45,000 per half hour. This prevents the quota from being filled by New Zealand programs sold at much cheaper prices in what (for New Zealand) is a secondary market. The requirement is proposed for children's drama '…where the ABA considers the argument for a minimum licence fee more compelling as the purchase of children's drama is more likely to be cost driven.' The ABA considered and rejected arguments for using minimum licence fees more widely.[4]

- The 'prime time' within which the quota for first release Australian drama must be shown is redefined from 5pm-midnight to 5pm-11pm. The reasons for this are not stated very explicitly in the ABA's November 1998 paper, but clearly reflect production industry concerns to prevent broadcasters from showing a cheap, low-rating New Zealand program late at night, when there are few viewers, to earn quota points.[5] Several submissions to this inquiry pointed out that '…if a network bought just one New Zealand strip drama and screened it five nights a week in a low ratings [ie late night] time slot, it would meet over half that network's adult drama obligations…'[6]

2.4 'First release' is redefined to exclude programs more than 18 months old (except feature films). This is to prevent New Zealand back catalogue from counting as first release in Australia.[7] Less directly but nevertheless of relevance to the issue under consideration was the following change:

- Eligibility under Division 10BA of the *Income Tax Assessment Act 1936* is removed. The ABA comments: '…in the event that 10BA is retained as a gateway, the equivalent New Zealand tax certification for qualifying programs would need to be included… [this] could result in differences in operation through the built-in discretion contained within each test. The ABA therefore proposes to remove the 10BA gateway from the revised standard.'[8]

2.5 Other proposed changes were not directly related to the Austalian/New Zealand content problem and are not discussed here since they are not directly relevant to the Committee's inquiry. .[9]

---

4 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 10-12

5 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 12-13; also L Osborne (ABA), Evidence 4 December 1998 p 20

6 Media Entertainment and Arts Alliance, Submission no. 17 p 2

7 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 13-14

8 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 7

9 'First release' to include telemovies previously broadcast on pay TV; changed definition of 'documentary; changed definition of 'sketch comedy'; additional creative elements test for animated

2.6 Project Blue Sky's challenge of the current Australian Content Standard determined by the Australian Broadcasting Authority represented a challenge to the australian content quotas for the commercial television industry. Submissions to this inquiry recognised this as being the crucial issue.

Australian Content Quotas on Television

2.7 There was overwhelming support from submissions and witnesses to this inquiry for Australian content quotas. The majority of witnesses were adamant that quotas are essential for maintaining appropriate levels of Australian content for cultural purposes; in particular, for preventing Australian television from being dominated by imports from the United States. The Committee was told, for example:

> 'If you want to look at the history of Australian television, it is self-evident that there has been a direct increase in the level and, I would argue, the quality of Australian programming in line with regulation. It has been no accident that Australians now enjoy access to a diversity and quality of programming that would have been unimagined by my parents when television first came to this country… You need not look in the statute books to find out what the local content rules are in Fiji or Pakistan; you need only look at their television guides. If it is saturated with reruns of *I Love Lucy* and *McHales Navy*, you can bet your bottom dollar that the national government has not made a decision that it is important to regulate in the public interest for local content.'[10]

2.8 The ABA noted in its Discussion Paper that domestic content quotas for television have been adopted by most western countries. Most are of similar type, sharing the objective of 'promoting the enhancement of national culture by limiting the consumption of foreign programs… Invariably, over 50 per cent of the airtime is reserved for domestic programming.'[11] A noteworthy exception is the USA, but in that huge market practically all free-to-air television is under American creative control in any case.[12] Further information on overseas local content rules is in APPENDIX 1.

2.9 Consistent with the support for the quota system to maintain a genuinely 'australian" feel on the nation's television screens, the majority of submissions to this inquiry called for the Committee to recommend repeal of section 160(d) of the *Broadcasting Services Act 1992* to enable the ABA to pursue the cultural objective of the Act without constraints. Most felt that the object of the Act was irreconcilable with

---

programs. Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 16-17

10 A Britton (Media Entertainment and Arts Alliance), Evidence 4 December 1998 p 5

11 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998, p 24, quoting F Papandrea, *Cultural Regulation of Australian Television Programs*, Bureau of Transport & Communications Economics Occasional Paper 114, 1997, Appendix 2, p 233

12 Department of Communications, Information Technology and the Arts, Submission no. 32 p 16

the provisions of section 160(d) and that together, they placed the ABA in "an impossible situation".[13] In the following section, the Committee examines first the implications of retaining section 160(d).

Industry Reaction to the new Draft Australian Content Standard

2.10 The majority of submissions to the Committee strongly rejected any approach, which would treat New Zealand programs as "australian" for the purposes of the australian content quotas. Witnesses appearing before the Committee at its public hearing (held after the release of the ABA's new Draft Australian Content Standard) reiterated their opposition to such an approach and many supported their stance in further written submissions to the Committee.

2.11 Notwithstanding the views of the High Court judges that the ABA can develop an Australian Content Standard that complies with section 122 of the *Broadcasting Services Act 1992* without breaching section 160(d), the majority of submissions to the Committee stated that that there is a fundamental tension between the cultural objective of the Act and the free trade objective of the CER Protocol. For example:

> 'SPAA [The Screen Producers Association of Australia] submits that there is a fundamental and irreconcilable conflict between the purpose of local content regulation to promote Australian cultural representation on television and the aims of trade liberalisation expressed in the Closer Economic Relations (CER) agreement…'[14]

> 'The ABA simply cannot determine a standard which achieves the cultural imperatives required of it under the Broadcasting Services Act, under the cloud of section 160(d).'[15]

2.12 The strong feelings which many objectors had against the draft standard and/or against paragraph 160(d) are clearly fuelled by what they see as the absurdity of defining an 'Australian' content standard to include New Zealand programs.

> '…It cannot really be called an Australian content standard at all. I think the Australian Broadcasting Authority might run foul of the Trade Practices Act under the misleading and deceptive conduct provisions, because this is an Australian and New Zealand content standard… You may as well call a spade a spade rather than continuing to call it an Australian content standard.'[16]

---

13 Australian Children's Television Foundation, Submission to ABA review, 3 September 1998

14 Screen Producers Association of Australia, Submission no. 22 p 112

15 Australian Children's Television Foundation, Submission no. 23 p 144

16 G Masterman, Evidence 4 December 1998 p 26

Any other changes to the standard?

2.13 The ABA, in forming the draft revised Australian Content Standard, considered and rejected a number of options, including: separate quotas for New Zealand programs; increased subquotas (but it does propose an increase for documentaries only); an 'on-screen' ('Australian look') test; minimum expenditure requirements; limits on subsidised programs; a first release *in Australia* requirement; a market attachment requirement. These were rejected either because they are impractical, or because, aiming to exclude New Zealand programs in practice, they might offend Article 8 of the CER Protocol (which prohibits 'disguised restrictions' on trade); or because the ABA considers that the mischief they aim to avert is not certain enough to warrant the action 'at this stage'.

2.14 The last point applies particularly to the possibility of increasing the subquotas, as some submissions suggested, to make room for New Zealand programs without reducing Australian programs. The ABA thinks that '…it is premature to increase these subquotas for drama and children's drama at the introduction of a new standard', using words that imply further monitoring and review in due course.[17]

2.15 The Screen Producers and Directors Association of New Zealand, by way of reassurance to the Australian production industry, proposed a phased-in ceiling on NZ programs in quota time.[18] The ABA has not followed this up as it thinks the proposal has 'significant practical and operational difficulties' and is not CER-compliant.[19]

2.16 This Committee does not propose to duplicate the ABA's consideration of these matters. The committee is satisfied that that ABA has done its best to make a draft standard that reconciles the cultural objective and the CER Protocol *within the constraints* of the present *BSA* and the High Court judgment. There is no magic solution yet undiscovered, to this problem. If 160 (d) is retained in its present form and the new ABA Standard implemented, it is only after the new Standard has been in operation for some time that its effectiveness in reconciling the cultural objective and the requirements of the CER Protocol could be measured.

Fears of an influx of New Zealand programs

2.17 One of the chief matters of concern expressed in evidence was the likely result, in practice, of admitting New Zealand programs to Australian content quotas. How much Australian content quota time will be taken up by New Zealand programs?

---

17 This point applies particularly to proposals to increase the subquotas. Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 8-9

18 Screen Producers and Directors Association [NZ], Submission no. 12 p46; J Tyndall (SPADA), Evidence 4 December 1998 p 29

19 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 10. See also Screen Producers Association of Australia, Submission no. 22a p 2

2.18 In general the Australian production industry and related interest groups stressed the traditional structure of the TV production industry with its practice of marginal pricing making for cheap prices in secondary markets. They fear that broadcasters will take up significant quantities of presumably cheaper New Zealand programs, replacing Australian programs in quota time, to the detriment of the cultural objective of the Australian Content Standard.

2.19 Concerns about replacement by New Zealand programs were chiefly focussed on the three subquota types: first release adult drama, first release documentaries, and children's programming (particularly children's drama). These are considered further below. Other program types, which make up the balance of the 55 per cent Australian content quota include news, current affairs, sport, infotainment, lifestyle and light entertainment programs. The ABA believes that these, being mostly local or ephemeral in character, are less vulnerable to replacement,[20] and the silence of most submissions on this suggests wide agreement, though the Australian Film Commission does caution:

> 'It is also very significant that Ten Network just met the overall transmission requirement in 1997 and 1996 [ie unlike the other networks, which overfilled the quota - see APPENDIX 3]. It has generally been believed that the areas which make up the balance of the transmission quota, news and current affairs, sport, infortainment and light entertainment, are less vulnerable to displacement by important programming… However, the Ten Network transmission results indicate this may need reassessing.[21]

2.20 To the general arguments about possible replacement by cheap imports, the Federation of Australian Commercial Television Stations (FACTS) and/or the New Zealand production industry made several answers. They stressed that historically New Zealand programs have not rated well with Australian viewers. They argue that this is a more important factor than licence fees.

> 'Programs made for the New Zealand market have to date had very little impact in Australia…. that will not change if such programs become eligible for the Australian quota. Broadcasters will continue to look for broad audience appeal in programs, even more than cost-effectiveness, and there seem to be no grounds for believing that programs made for the New Zealand market will become more attractive to Australian viewers.'[22]

2.21 FACTS pointed out that most Australian networks overfill most of their quotas, and spend much more on quota-satisfying programming than the quotas demand. The argument is that this proves that audience appeal is the more important

---

20 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1988, p 24-25

21 Australian Film Commission & others, Submission to ABA's review of the Australian Content Standard, 1998, p 14

22 Federation of Australian Commercial Television Stations, Submission no. 25 p155

thing, and that the networks are *not* driven by a search for cheap 'quota quickies' that New Zealand might supply.

> 'Australian commercial broadcasters spend over $800 million a year on local programming… They deliberately choose to commission quite an amount of expensive drama. They could obviously meet their quota requirements with fairly cheap serials. They choose not to because it is essentially a market driven broadcasting sector… The great bulk of the work Australian broadcasters do in the way of [supporting] local production is not quota driven.'[23]

Details of the networks' compliance with the quotas are in APPENDIX 3.

2.22 SPADA-NZ and FACTS stressed the small size of the New Zealand production industry compared with the Australian production industry, and the fact that only a small proportion of its product (certainly, only a small proportion of its government subsidised product) is sold outside New Zealand.[24] The implication is that even if Australian broadcasters were minded to buy New Zealand programs, there would be little suitable product available. In FACTS's view:

> 'There is only a small amount of New Zealand programming relevant to the subquotas. That comprises 410 hour of children's programming (but no children's drama), 189 hours of documentaries (of generally parochial interest only) and approximately 150 hours of [adult] drama per annum.'[25]

2.23 Screen Producers and Directors Association of New Zealand (SPDANZ) pointed out that… 'Australian dramas, serials and format programs have established a significant market share and audience acceptance within New Zealand. The same is far from true in reverse, with a combination of local content regulations and cheap, less risky (from a ratings perspective) US and British programs, combining to keep New Zealand programs effectively out of the market. Between 500 and 600 hours of Australian programs are screened on New Zealand free-to-air television per year. This compares with around 20 hours of New Zealand programming broadcast annually on Australian television.'[26]

2.24 The Committee was not convinced by the arguments put forward by SPADANZ in relation to this last point: Whether New Zealand programs are

---

23 T Branigan (FACTS), Evidence 4 December 1998 p32; see also FACTS, Submission no. 25 Attachment (submission to ABA September 1998) p 4. See APPENDIX 3, for figures on the networks' compliance with the quotas. The main areas where there is only bare compliance are: all networks for first release children's drama quota; also Ten Network for general transmission quota and documentary quota.

24 Screen Producers and Directors Association [NZ], Submission no. 12, p 41, 44 & FACTS, Submission no. 25, p 6

25 Federation of Australian Commercial Television Stations, Submission no.25 Attachment (Submission to ABA September 1998) p 6

26 Screen Producers and Directors Association [NZ], Submission no. 12 p 42

competitive against US and British programs outside quota time says little about whether they will be competitive against Australian programs within quota time.

2.25 It seems inconsistent for SPDANZ to point to the present imbalance in trade in support of including New Zealand programs in an Australian Content Standard while simultaneously giving reassurances that there will probably not be much change to what is broadcast on Australian TV screens. As a matter of cultural policy, if New Zealanders see a problem in the amount of Australian programming on New Zealand TV, that is an issue for their government to consider. It has no bearing on the Committee's deliberations in the Australia's cultural policy.

2.26 The Committee notes here the argument of the Australian production industry that since New Zealand does not have local content quotas, 'there is no reciprocity'. That is, Australian programs in New Zealand, since they must compete against the rest of the world, are disadvantaged relative to New Zealand programs in Australian quota time, which will need to compete only against Australia.[27] It was suggested that:

> 'Interestingly, the New Zealand case is not for complete free trade in television programs. If that were so they would have joined the mainly American push against all forms of local content regulation. The New Zealand argument is not for open competition with all suppliers of programs to the Australian domestic market. Instead they seek to have equality of advantage with Australian programs producers in Australia.'[28]

Effect of including New Zealand Programs on the Subquotas

2.27 The inquiry revealed widespread fear in the Australian film production industry that the inclusion of New Zealand made programs for the purpose of meeting the "australian content" quotas as required in the ABA's Standard would have a major negative effect on the australian industry. Many submissions argued that some subquota types are particularly vulnerable to replacement. They are: first release Australian drama, documentaries and children's drama. [29] Submissions pointed out that programs of these types comprise less than three per cent of total commercial broadcast hours.[30] The Australian Film Commission said that:

---

27 Media Entertainment & Arts Alliance, Submission no.17 p88; Australian Film Commission, Submission no. 29 p 230

28 Screen Producers Association of Australia, Submission no. 22 p 126-7

29 There was some confusion in evidence between children's *programming* and children's *drama*. The networks must show 130 hours per year of Australian children's programs of which 32 hours must be first release Australian children's drama.

30 For example, Media Entertainment and Arts Alliance, Submission no. 17 p 86; Australian Screen Directors Association Ltd, Submission no. 27 p 170.

> The [first release Australian] drama requirement provided in 1997 an average of 168 hours of Australian drama per network - just half an hour a day and a mere 1.9 per cent of all programming.[31]

2.28 The inference from such statements is clearly that these subquotas are so small that they should be jealously guarded. In response FACTS argued that to express the subquotas as percentages in this way is scarcely relevant:

> 'What this [the 1.9 per cent just quoted] presumably means is that first-release Australian drama (which by definition is scheduled between 6.00pm and midnight) comprises 1.9 per cent of first release and repeat hours scheduled by stations from 6.00am to midnight. That is clearly a meaningless figure, as it confuses quite different categories and time periods. As a proportion of all first-run prime-time programming, Australian drama is more like 15 per cent.'[32]

2.29 The ABA's subquotas currently amount to about 3 per cent of total broadcast time. The Committee considers that arguments about percentages are not directly relevant here since this is not an inquiry about whether 3 per cent is a good figure. This question for this inquiry is what *proportion* of the 3 per cent is vulnerable to replacement by New Zealand programs. Similarly (recalling the arguments of the New Zealand production industry in the previous section), whether the New Zealand production industry is smaller than the Australian production industry is beside the point. The question for this inquiry is whether the New Zealand industry, small though it may be, is well positioned to replace a significant *proportion* of the 3 per cent of broadcast time.

2.30 The actual hours of New Zealand production, and Australian broadcasting, in the three subquota categories, can be seen in APPENDICES 3 and 4.

First release Australian drama

2.31 In 1997 336 hours of New Zealand made drama/comedy were broadcast in New Zealand, of which 170 hours were first release. 62 hours of drama/comedy production were subsidised by New Zealand on Air, the New Zealand government funding body. The Australian content quota is between 80 and 258 hours per year (depending on the mix of program types chosen to make up 225 points), and the networks broadcast, on average, 168 hours.[33] See APPENDICES 3, 4 and 6.

2.32 Several submissions pointed out that:

---

31 Australian Film Commission, Submission no. 29 p 220

32 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (FACTS Submission to ABA 21 October 1998), p 6

33 Australian Film Commission, Submission no. 29 p 220

> …If a network bought just one New Zealand strip drama and screened it five nights a week in a low ratings time slot, it would meet over half that network's adult drama obligations…[34]

2.33 FACTS rejected that argument on the basis that New Zealand drama is not likely to be appealing to the networks:

> '…programs like *Shortland Street* already have equivalents in Australia, eg *Breakers, Pacific Drive, Heartbreak High*, where it can be argued that Australia is a secondary market and, as a result, the cost of such programming is already moderate compared to international product. Networks are not going to take the additional risk of scheduling New Zealand programs such as these (with lower production values, and containing New Zealand-specific language and issues) in order to save very little.'[35]

2.34 FACTS also stressed the networks' voluntary expenditure on quality Australian drama, and the fact that they overfill the quota, to show that they are not in search of 'quota quickies':

> 'If programming decisions were made purely on cost, there would be a very different line-up of programming on Australian television, including much more lower-cost Australian drama. What current schedules demonstrate is that cost is only one factor.'[36]

2.35 In answer to this the Australian production industry pointed out that the networks' expenditure on and broadcasting of Australian drama has declined in recent years. According to the Australian Film Commission (AFC), from 1995/96 to 1996/7 the networks' expenditure on Australian drama has declined by 4.4% while their expenditure on foreign drama has increased by 14.6%; and hours of Australian drama broadcast have declined from 195 in 1993 to 168 in 1997.[37] The AFC quotes with approval a September 1995 ABA report that '…there has been a steady decline in expenditure on Australian drama since 1990.'[38]

2.36 FACTS's response is that these figures are not what they seem, partly for various technical reasons to do with changed data-gathering and accounting methods; partly because -

---

34 Media Entertainment and Arts Alliance, Submission no.17 p 73 (for example)

35 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (submission to ABA September 1998) p 6

36 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA September 1998) p 7

37 Australian Film Commission, Submission no. 29 p 223

38 Australian Film Commission, submission to ABA review 1998, p 15, ABA, *Australian Content - review of the program standard for commercial television,* September 1995, p 33

> 'Nowadays, overseas sales of these programs mean that the Australian broadcast licence fees can be considerably less than 100 per cent of the production cost… This means that broadcasters may be able to secure the Australian drama inventory they wish to schedule more economically than they could in past years… Taken as a whole, there is no doubt that Australian drama in 1998 is of significantly higher quality than it was in the late 1980s.'[39]

2.37 The ABA, in deliberating on the draft standard, considered and rejected proposals to increase the adult drama subquota to compensate for the risk of replacement. Its reasoning echoes the argument of FACTS -

> 'Historical evidence indicates that drama produced in New Zealand and shown in Australia does not perform well, and is therefore not a viable or attractive option for Australian networks at this stage…'[40]

2.38 Many in the Australian production industry remain sceptical that the changes will not have a dramatic effect on the number of programs made in Australia (or New Zealand) that would be broadcast to fill the subquotas:

> 'I do not accept the proposition that New Zealand programs are somehow so inherently poor that they will not be well received in our markets… We should not be allowed to take any comfort from that argument.'[41]

2.39 The ABA does propose to cut back the quota-defining 'prime time' from 5pm-midnight to 5pm-11pm to limit the possibility of screening a cheap import late at night to gain quota points. This, however, has its downside, admitted by both FACTS and the Australian production industry: it limits a network's ability to test a new program or to play out an unsuccessful one, outside prime time (that is, outside the *real* prime time mid-evening). This… 'will force networks to become far more conservative in their development [of new Australian drama] and far less willing to take risks in the commissioning of new programs'.[42] FACTS uses this point to argue against truncating 'prime time'; the Australian production industry mentions it, implicitly, to reinforce their general position that the ABA, in the new Standard, is being asked to do the impossible. The Australian Writers' Guild also claims that should a network wish to screen a 'quota quickie', the 5-6pm 'shoulder' period is still available.[43]

---

39 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA, 21 October 1998), p 6

40 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard,* November 1998, Attachment D p 8

41 A Britton (Media, Entertainment and Arts Alliance), Evidence 4 December 1998 p 20

42 Australian Film Finance Corporation Ltd, Submission no. 31 p 288; Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA, September 1998) p 14

43 S McCreadie (Australian Writers' Guild), Evidence 4 December 1998 p 19;

First release Australian documentaries

2.40 In 1997 269 hours of New Zealand made documentaries were broadcast in New Zealand, of which 189 hours were first release. 99 hours of documentary production were subsidised by New Zealand on Air. The Australian content quota is 10 hours of first release Australian documentaries per year, and the networks broadcast about 35 hours on average (7 Network), 23-27 hours (9 Network) and 10.5 hours (10 Network). See APPENDICES 3, 4 and 6.

2.41 According to Film Australia, documentaries are particularly vulnerable to replacement:

> '…high quantities of documentaries in the travel and adventure, and wildlife areas are produced in New Zealand each year. In the 1996-97 year, 269 hours of local documentary were broadcast on New Zealand commercial television and 89 documentaries were produced for $NZ27.6m… Of this expenditure, government subsidy contributed $NZ 12.2m, with New Zealand On Air the largest investor contributing $NZ 9.7m towards 99 hours of documentary production… It is obvious from these figures that the documentary sub-quota is extremely vulnerable to displacement by New Zealand documentary programming. The amount of documentary screened could fill the Australian content quota for each commercial network 20 times over; the amount subsidised could fill the current quota almost 10 times.'[44]

2.42 On the other hand, FACTS describes New Zealand documentaries as 'of generally parochial interest only'[45] and the Screen Producers and Directors Association [NZ] stresses the small overseas sales of New Zealand documentaries:

> 'Over the last nine years, an average of 12 hours of documentary programming have been sold internationally per year. This is the equivalent of around 10 per cent of total documentary hours funded [by New Zealand On Air].'[46]

2.43 The contrast between the different points of views highlight the difficulty in extrapolating from what *is* currently the case (12 hours per year of New Zealand documentaries sold overseas) to predict what *might* be in an uncertain future for which there is no precedent (99-269 hours of New Zealand documentaries potentially available to fill Australian quota time[47]).

---

44 Film Australia, Submission no. 34 p 6

45 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA September 1998) p 6

46 Screen Producers and Directors Association [NZ], Submission no. 12 p 44

47 Note that the 269 hours *broadcast* in 1996-97 includes repeats, much of which would presumably be excluded from Australian quota by the proposed 18 month rule.

2.44 FACTS argues incidentally that, since most stations overfill their documentary quota in any case, the documentary quota serves no good purpose and should be abolished.[48] Film Australia regrets what it calls the networks' lack of commitment to documentaries other than travel, adventure and wildlife; quotes evidence suggesting 'a substantial unmet demand for Australian documentaries'; and sees the quota as a longer term investment in encouraging the networks to take risks with a wider variety of documentary material '…in much the same way their programming decisions in the drama area have met with much success (even though they may have been sceptical at the outset'.[49]

2.45 The ABA acknowledges the vulnerability of Australian documentaries, and proposes to increase the documentary subquota from 10 to 20 hours '…to serve as a safety net for Australian documentaries'.[50] Film Australia welcomes this but regards it as an inadequate response to the real nature of the problem:

> 'An extra 10 hours per year - given that two of the three networks are already screening that amount - of quota material will make no impact on the attractiveness of New Zealand programming…'[51]

Children's programs

2.46 In 1997 806 hours of New Zealand-made children's programs were broadcast in New Zealand, of which 366 hours were first release. 410 hours of children's programs were subsidised by New Zealand on Air. The Australian content quota for first release Australian children's programs is 130 hours per year, and the networks each broadcast 130-135 hours. See APPENDICES 3, 4 and 6.

2.47 Children's programming generally should be distinguished from children's drama. The Australian Children's Television Foundation had concerns about possible replacement of children's programs generally, based on the proportions of the above figures:

> '…the New Zealand production industry is easily capable of producing enough programming to meet our entire children's programming quota for each of the three commercial broadcasters.'[52]

---

48 T Branigan (FACTS), Evidence 4 December 1998 p 31

49 Film Australia, Submission no. 34 p 4-5: '[The networks] are not convinced that other types of documentary programs - which often have cultural, historical, political or artistic issues as their central concerns - are popular with audiences… The unmet demand for locally produced factual programs extends to the nation's schools and universities where there is a serious shortage of local audio-visual content for educational use… over time networks could be convinced of audiences' desire for more documentary product and to take risks with the material…' See also R Harris (Australian Screen Directors Association), Evidence 4 December 1998 p 31

50 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 9

51 Film Australia, Submission no. 34 p 7

2.48 The ABA told the Committee that,'…most other New Zealand children's programming would not meet the ABA C [children's] and P [pre-school] classification standards.'[53] While the New Zealand industry commented:

> 'New Zealand on Air has supported the production of children's programming, as distinct from children's drama, in significant hours. However, a very significant proportion of that is magazine studio-based shows which have a very short shelf life and no life outside New Zealand. An average of nine hours per year, or 2.5 per cent of the total hours funded for children's programming, has been sold outside New Zealand in the course of the last 10 years.'[54]

2.49 A substantial number of submissions used the example of children's drama. The Australian content quota for first release children's drama is 32 hours per year (28 hours in 1997), and all the networks only just meet it (see APPENDIX 3). It is generally admitted that children's drama, being unattractive to advertisers, is quota-driven. This would make replacement by cheaper imports attractive.

> '[Children's] Programming prior to the introduction of the standard was price driven and if the option to acquire cheaper programming and still fulfil the requirements of an 'Australian' content standard emerges, it is difficult to see that price will not again become the major determinant in the purchase of programs… If one Australian network chose to screen half an hour a week of New Zealand children's drama it would meet 80 per cent of its quota requirement.'[55]

2.50 To allay these concerns FACTS pointed out that '…networks already have well-developed plans or commitments with Australian producers which are sufficient to meet their 'C' [children's] drama requirements for the next three years'.[56] The NZ production industry stressed that '…no children's drama programs have been made in New Zealand in last six or seven years', and does not foresee any change to that trend:

> 'In an environment in New Zealand where there is a steadily eroding amount of domestic fudging available to finance local productions, and also in an environment where there is no disposition on the part of New Zealand broadcasters to commission children's drama, I do not see that that situation is going to improve in the medium term.'[57]

---

52 Australian Children's Television Foundation, Submission no. 23 p 139-140

53 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 8

54 J Tyndall (Screen Producers and Directors Association [NZ]), Evidence 4 December 1998 p 33

55 Media Entertainment and Arts Alliance, Submission no. 17 p 73, 77-78

56 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA September 1998), p 6

57 J Tyndall (Screen Producers and Directors Association [NZ]), Evidence 4 December 1998 p 32

2.51 The Australian production industry is not reassured. The Australian Children's Television Foundation queried the New Zealand definition of 'children's drama':

> 'NZ On Air's Annual Report for that year [1996/97]… does not indicate what would qualify as 'drama' programming. One of the programs funded last year by NZ On Air was a computer-animated series entitled *Squirt*. This 25 episode series could well be classified as drama under the current criteria in the Australian Standard.'[58]

2.52 The Australian Film Finance Corporation, acknowledging that '…New Zealand producers are not currently making large amounts of children's drama programs', perceived a risk of replacement 'at least in the medium term.'[59] The implication is that New Zealand producers might start producing for the Australian quota market.

2.53 The Committee is particularly concerned about the likely effect on children's drama and documentaries of admitting New Zealand programs as part of the subquota. It notes the submission of the Western Australian Chapter of the Screen Producers Association of Australia who stated:

> In Western Australia these two activities (children's drama and documentaries) represent the foundation of the industry. In fact, apart from the occasional telemovie or feature film we produce little else but C classification children's drama and documentaries. It has taken 16 years to build the reputation and output of these two areas to a point where we now have national and international markets… Our industry would suffer a very severe setback if section 160 (d) is not repealed… While not underestimating the effect on the industry generally I believe the impact on regional industry would be catastrophic.[60]

2.54 On this issue, the ABA comments: 'If programs were produced to meet the standard, the costs would approach those of locally [Australian] produced programs.'[61] In other words, a New Zealand program produced for the Australian market would have to recoup its costs in the Australian market (or at least, in the joint Australia/ New Zealand market): it would have to compete with Australian programs on its merits, without the advantage of secondary pricing.

2.55 The ABA does propose, as a 'safety net', to institute a minimum licence fee of $45,000 per half hour for first release children's drama programs to satisfy the quota:

---

58 Australian Children's Television Foundation, Submission no. 23 p 139

59 Australian Film Finance Corporation, Submission no. 31 p 287

60 Screen Producers Association of Australia, Western Australia Chapter, Submission no.37, p 1

61 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D, p 8

'The modest amount of children's drama required each year is a further reason to ensure that it is not subject to substitution due to price cutting.'[62]

Problem of subsidies to New Zealand TV programs

2.56 An argument relevant to all the vulnerable types of programs is that New Zealand programs will have an unfair advantage because they are said to be more widely or more highly subsidised by government than the equivalent Australian programs.

> 'A significant proportion of the New Zealand programs are produced with Government subsidy from New Zealand On Air whereas in Australia less than 2 per cent of programs currently qualifying as Australian content are in receipt of any subsidy.'[63]

2.57 In 1996/97 NZ On Air funded 62 hours of drama, 99 hours of documentary, and 410 hours of children's programs, and for the subsidised programs the subsidies represented between 55 and 80 per cent of production costs (see APPENDICES 6 and 7). According to the Australian Film Commission:

> 'Subsidy through NZ On Air available for a wider range of programs and to a significantly higher percentage of a program's budget than is available in Australia. - for example, long running series and serials for which no subsidy is available in Australia… Subsidy is also available for general children's programming, an area not subsidised in Australia.'[64]

> '…in Australia, federal subsidy through the Australian Film Finance Corporation (FFC) is only available for adult drama programming for miniseries (up to 8 hours) and telemovies. State funding bodies provide some support for series in development and production but this is a small proportion of overall production costs…. Large amounts of documentary programming are both broadcast in New Zealand and supported by NZOA. This contrasts with Australia where the documentary production that is subsidised through the FFC and other bodies such as Film Australia rarely makes its way onto commercial television… It is evidence that documentary is more popular and better supported by New Zealand television than it is by commercial television in Australia.'[65]

2.58 The Australian Children's Television Foundation saw a risk that '…Australian commercial broadcasters would be encouraged to commission the production of children's programs from New Zealand producers, who are able to access NZ On Air funds, and thus be able to provide programming at a much cheaper

---

62 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D p 12

63 Media Entertainment and Art Alliance, Submission no.17 p 73

64 Australian Film Commission, Submission no.29 p 234-5

65 Australian Film Commission and others, Submission to ABA review, 1998, p 20

cost to the Australian commercial networks than new Australian programs would involve.'[66]

2.59 In reply the Screen Producers and Directors Association (SPADA) [NZ] pointed out that '…the New Zealand On Air subsidy system is the only form of protection or support for the production industry in New Zealand…. By contrast, Australia has a combination of policy mechanisms, including public service broadcasting (ABC and SBS), direct government subsidy (AFFC, CTVF and state level funding) and local content regulation.' According to SPADA, the consequence of this broader public service role of New Zealand On Air is that few of the programs it supports are made with any thought of international sale:

> 'Over the last nine years, an average of 12 hours of documentary programming have been sold internationally per year. This is the equivalent of around 10 per cent of total documentary hours funded. An average of 9 hours per year (or 2.5% of total hours funded) of children's programming has been sold outside New Zealand.'[67]

2.60 SPADANZ also argues: 'The funding history of a program has no relevance to the price at which it might be sold. The fact that there are differing subsidy and support arrangements amongst the member states of the European Union has not been considered relevant in drawing up the provisions for unrestricted intra-European trade in television programs.'[68]

2.61 According to the ABA:

> 'The differences in the types of programs subsidised and the preconditions associated with programs qualifying for subsidy assistance make it difficult to compare the levels of subsidy provided in Australia and New Zealand… However, with the exception of children's programs, it appears that levels of subsidy as a percentage of production costs are roughly similar.'[69]

Longer term effects

2.62 There was an undercurrent in submissions by the Australian production industry to the effect that even if the short term risks of the new standard seem small, the longer term risks should not be underestimated. There are several issues here:

---

66 Australian Children's Television Foundation, Submission no. 23 p 140

67 Screen Producers and Directors Association [NZ], Submission no.12 p 44

68 Screen Producers and Directors Association [NZ], Submission no.12 p 45

69 ABA, *Review of the Australian Content Standard - Discussion Paper,* July 1998, p 43

- A fear that Australian networks would be tempted to replace Australian with New Zealand programs, if not at once, then at the time when a popular series ends and the high start up costs of commissioning a new one must be faced.[70]

- A fear that the New Zealand industry, helped by government subsidies, could gear itself up to produce for the Australian market:

> 'It is apparent from reading the New Zealand trade press and from Project Blue Sky's public comments that the New Zealand industry intends to gear production to the Australian market. It is also worth nothing that the last few years have seen the growth and consolidation of three to four major production groups in New Zealand capable of supplying product of sufficient quality to replace Australian series. NZ On Air has been increasing its subsidy percentages in recent years. Further, Project Blue Sky's stated strategy is to encourage "NZ On Air and the New Zealand Film Commission to widen funding criteria to allow New Zealand ideas which are designed for the international market."'[71]

- The perceived 'medium term risk' to children's drama mentioned earlier (paragraph 2.52, even though no children's drama is now produced in New Zealand) contains the same idea.[72] A related idea is that Australian producers would be encouraged to work in New Zealand, '…draining our local industry of talent and resources.'[73]

- A fear that broadcasters, even where they do not actually use New Zealand imports, will use the threat of New Zealand imports as leverage to force down licence fees for Australian programs generally.[74]

- As a logical extension of the previous point: a fear that a single market in TV production will lead to reduced licence fees in both countries and reduced production in the two countries in total:

> 'If one drama series will do for both Australia and New Zealand, why would two be made, one for each country?'[75]

---

70 For example, Australian Film Commission, Submission no.29 p 232; S McCreadie (Australian Writers'Guild), Evidence 4 December 1998 p 19

71 Australian Film Commission, Submission no. 29 p 232, quoting Project Blue Sky, *The Six Key Goals*, Project Blue Sky background paper.

72 Australian Film Finance Corporation, Submission no. 31 p 287

73 Australian Children's Television Foundation, Submission no. 23 p 140

74 For example, R Harris (Australian Screen Directors Association), Evidence 4 December 1998 p 28

75 Australian Film Commission, Submission no.29 p239-40 quoting K Hunter (New Zealand Screen Writers Guild); also K Ireland (Australian Film Commission), evidence 4 December 1998 p 32 See also T Branigan (FACTS), evidence 4 December 1998 p 30: in proportion as a New Zealand program has Australian sales, one would expect the New Zealand broadcaster to bargain down the New Zealand licence fee, forcing the producer to seek more than marginal cost recovery in the Australian licence fee. Mr Branigan made this point to argue that the discrepancy between primary and secondary prices can be

2.63 For the Australian production industry, it is irrelevant whether the future proves that their fears were unfounded: the lack of certainty is in itself a chief objection:

> 'The potential changes to the Standard ensure there is no longer ANY certainty about minimum levels of Australian programs that might be broadcast. Thus, providing no level of certainty to the Australian production sector about future base levels for independent program production.'[76]

> 'This is a highly volatile, difficult industry. The margins are getting slimmer, particularly with the introduction of digital technology and with new players coming on the market… For anyone to leave this room thinking that in the future there is not a significant chance that high cost Australian programming may be displaced by New Zealand programming which is looking to pick up its secondary market - much of which is heavily subsidised by the New Zealand government - is extremely naïve.'[77]

Committee comment

2.64 If, as a result of the new Standard, New Zealand producers decide to produce for Australia *as their primary market*, they will not be able to sell in Australia at secondary prices. [78] However the Committee recognises that there is a possibility that they could compete with the Australian produced programs at primary prices, and that this would have implications for the cultural objective of the Australian Content Standard.

2.65 The Committee is sympathetic to the concerns of the Australian production industry and related groups in the broadcasting and film industries about the possible negative effects of New Zealand programs on Australian programs within the australian content quotas. The major difficulty facing the Committee in this debate is the fact that the anticipated negative effects from the ABA's new Australian Content Standard are merely speculative. The Committee agrees with the Department of Communications, Information Technology and the Arts that there is no way of knowing how the situation will develop.[79]

2.66 The Committee notes that the ABA is committed to monitor and review the situation in two years 'to assess how well the standard is achieving its cultural

---

less than is sometimes claimed; but the point also relates to possible reduced licence fees in a single market.

76 Australian Film Finance Corporation Ltd, Submission no.31 p 293

77 A Britton (Media Entertainment and Arts Alliance), Evidence 4 December 1998 p 30

78 T Branigan (FACTS), Evidence 4 December 1998 p 30

79 DOCITA, Submission no.32, p.6

purpose'.[80] Should the ABA's new Standard be implemented the Committee recommends a close monitoring of the situation.

2.67 The Committee is also concerned that the approach that the ABA has taken in devising its new Australian Content Standard within the constraints of section 160(d) of the *Broadcasting Services Act 1992* might give the erroneous impression that, in the ABA's view, Australian culture and New Zealand culture are one and the same and are interchangeable. Accordingly,

Recommendation 1

The Committee recommends that the Australian Broadcasting Authority (ABA) state in the introduction to its new Australian Content Standard that Australian culture and New Zealand culture are different from each other. They each have their own distinct characteristics and are not interchangeable. The ABA must make it clear that if the new Australian Content Standard gives special status to New Zealand productions the aim is solely to make the Standard consistent with Australia's obligations under the CER Protocol.

Recommendation 2

The Committee recommends that, in the event of the ABA's new Australian Content Standard being implemented, its effects on the number of New Zealand programs broadcast as part of various television quotas should be closely monitored by the ABA, with a view to taking remedial action if the ABA finds that object 3 (e) of the *Broadcasting Services Act 1992* is no longer being met. The ABA should report to the Minister after 2 years of operation of any new Standard.

International Implications of Retaining 160(d)

2.68 A number of submissions expressed the fear that if paragraph 160(d) of the *BSA* were retained in its present form, other nations who have treaties with Australia which include 'no less favoured treatment' clauses, would seek the same favoured treatment accorded to New Zealand under the "australian content" quotas for commercial television. Others argued that in its present form, the CER sets a precedent that will weaken Australia's bargaining position in negotiating for a cultural carveout in future trade agreements.

80 ABA, *Review of the Australian Content Standard - Proposed Standard*, November 1998, p 4

Possible 'no less favoured treatment' obligations to other nations

2.69 Of particular concern in some submissions, were the Basic Treaty of Friendship and Co-operation between Australia and Japan (the Nara Treaty: Australian Treaty Series 1977 no. 19) and the OECD Code of Liberalisation of Current Invisible Operations (Australian Treaty Series 1971 no. 11).

2.70 The Nara Treaty requires the parties to give each other treatment which is 'not discriminatory between nationals of the other Contracting Party and nationals of any third country' (Article 9). The fear is that Japan could demand access to Australian television no less favourable than New Zealand. The Australian Film Commission argued that this scenario could eventuate because:

> 'Japan has a thriving children's animated program industry and a number of such programs have been shown on Australian television. Animated programs are already dubbed… so redubbing in English does not have the same difficulties from the audience point of view that dubbing drama has.'[81]

2.71 The OECD Code requires members to liberalise trade in certain listed 'invisible operations', which include importation of recordings for television broadcast (Articles 1 & 2; Annex A). Within this positive list (Annex A) reservations (ie negative lists: Annex B) are allowed, and Australia has reserved 'time-quota limitations on the television screening of programs which are not of Australian origin.' However, a different article of the Code demands that members shall not discriminate between other members in liberalisation of the matters in the positive list (Article 9). Some argue that *this* article makes no allowance for a negative list, and accordingly any OECD Code signatory could demand equal treatment with New Zealand in the matter of importation of recordings for television broadcast.[82]

2.72 In its submission to the Committee, the Attorney General's Department stated that it believed these concerns to be unwarranted:

> 'We have considered whether there would be any flow-on effects… we have examined Australia's obligations under the following international trade instruments to which Australia is a party:
> • the OECD Code of Liberalisation of Current Invisible Operations ('the OECD Code') [ATS 1971 no. 11]
> • the Basic Treaty of Friendship and Co-operation between Australia and Japan [ATS 1977 no. 19]
> • the General Agreement on Trade in Services ('GATS') [ATS 1995, no. 8]; and
> • bilateral Investment Promotion and Protection Agreements ('IPPAs').
>
> 'There are good arguments Australia could rely upon against the application of these treaties through paragraph 160(d). For example, Australia has made express reservations under some of these agreements.

81 Australian Film Commission, Submission no.29 p 246

82 For example, Australian Film Commission, Submission no.29 p 244

> Australia has reserved 'time-quota limitations on the television screening of programs which are not of Australian origin' in relation to the OECD Code (article 2(b) Annex B) and the provision of television services does not form part of the Australian GATS offer.'[83]

2.73 The Committee accepts that there are 'good arguments' along those lines but the Committee notes that there are those who argue that the matter is not free from doubt. Some question whether Australia and New Zealand are a 'customs union' (which would remove the problem in respect of the OECD code).[84]

2.74 Submissions also mentioned the possibility that Australia has other relevant obligations unnoticed among the 900-odd treaties to which Australia is a party. In this context, the Committee notes the supplementary submission of the Australian Film Commission [85] in which it tendered legal advice on this issue, provided by Associate Professor Donald Rothwell of the University of Sydney.

2.75 The Attorney-General's Department suggested in its submission, that one option would be for paragraph 160(d) to be amended to "refer specifically to the CER Protocol": In AG's opinion,

> Such an amendment would also have the effect of excluding the operation of other treaties in the context of the formulation of broadcasting standards.[86]

2.76 The Department of Communications, Information Technology and the Arts suggested another option:

> One approach which could be considered as a way of assisting the ABA in the exercise of its regulatory responsibilities would be to amend s.160 (d) to mirror s.580 of the *Telecommunications Act 1997*, which requires the ACA to have regard to Australia's obligations under any convention of which the Minister has notified the ACA in writing. If an identical provision were to apply to the ABA, the Minister could notify the ABA either to have regard to the CER Services Protocol alone, or such additional treaties as the Minister considers relevant.

2.77 The Committee believes that the possibility of paragraph 160 (d) applying to other international treaties is not an issue that can remain unresolved. In the Committee's view, the issue is of such importance that it should be clarified through amendments to section 160(d). Accordingly,

Recommendation 3

---

83 Attorney General's Department, Submission no.28 p 199

84 See Pryles M, Waincymer J & Davies M, *International Trade Law: Commentary & Materials*, 1996, p 877

85 Australian Film Commission, Submission no.29 (b)

86 Attorney-General's Department, Submission no.28 p 195

The Committee recommends that section 160(d) of the *Broadcasting Services Act 1992* be amended to require the ABA to perform its functions having regard to Australia's obligations under any convention of which the Minister has notified the ABA in writing.

Australia's bargaining position in future treaty negotiations

2.78 Several submissions fear that to allow New Zealand access to Australian content quotas will weaken Australia's bargaining position in arguing for 'cultural carveouts' in other treaty negotiations in future.

> 'In the Uruguay Round of negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), now World Ttrade Organisation (WTO), Australia, like most countries, made no commitment to lieberalise assistance mechanisms in the audiovisual sector… Nonetheless, the USA will undoubtedly continue with its battle to reduce barriers in the next Round which is due to start again in the year 2000, because it clearly suits the interests of their industry. To compromise the Australian Content Standard by giving prominence to the CER would severely compromise the ability of Australia to maintain its position…'[87]

2.79 The Department of Foreign Affairs and Trade acknowledges that '…it is possible Australia will be asked by trading partners, and specifically the US, to remove or reduce the television local content quotas.'[88]

2.80 On the other hand the Screen Producers and Directors Association [NZ] believes that it is possible and desirable for Australia to ring-fence the CER - as a pre-existing agreement - without implications for other international trade and trade policy interests Australia might wish to pursue.[89] We note also the argument of the Australian Writers' Guild that:

> 'There is clearly an enormous level of precedent for treaties to contain cultural reservations… If the Australian government fails to resolve this issue and act decisively, rather than being respected in diplomatic circles we will be a laughing stock…Defending our right to regulate would not be regarded as unreasonable by our trading partners as the right to regulate in this area is internationally recognised….'[90]

2.81 This was part of an argument that the CER Protocol should be renegotiated to avoid creating a bad precedent. The committee affirms the importance of cultural

87 Australian Screen Directors Association Ltd, Submission no.27 p 179

88 Australian Film Commission, submission 29 p 247, quoting DFAT submission to ABA Local Content on Pay TV Inquiry, December 1996

89 Screen Producers and Directors Association [NZ], Submission no. 12 p 42. Similarly G Randal (New Zealand High Commission), Evidence 4 December 1998 p 25

90 Australian Writers' Guild, Submission no. 30 p 277,280

carveouts in free trade negotiations, and we expect that the Australian government will maintain that position.

Problem of New Zealand/ third party co-productions

2.82 The draft Australian Content Standards retains Australian official co-productions as a gateway to quota. Several submissions were concerned that New Zealand/ third party official co-productions could demand equal rights. According to the ABA, all except the New Zealand Government and the Screen Producers and Directors Association [NZ] agree with the ABA that New Zealand/ third party co-productions should be excluded.[91]

2.83 The New Zealand government, in its submission to the ABA review, argued that '…if a gateway is provided for Australian programmes made under the provisions of a co-production treaty, then the same criteria must apply to New Zealand programmes.'[92] SPADA [NZ] considers that New Zealand/ third party co-productions should be accepted '…but with acceptance that the benefits of the CER Agreement should not extend beyond the member states.'[93] It is not very clear how this proviso would work in practice.

2.84 FACTS considers that even if New Zealand/ third party co-productions are accepted… 'This is not likely to pose a problem of any practical significance, given the small number of co-productions involved.'[94] Others in the Australian production industry are more concerned. According to the Australian Film Commission:

> 'The predominance of television programming in New Zealand's co-production program is significant. As this includes series and serials, in addition to mini-series and telemovies, the television hours involved are much greater than is suggested by 15 programs.'[95]

2.85 The Attorney-General's Department gave evidence to the Committee that in its view, the CER Protocol does not require equal treatment for New Zealand/ third party co-productions, since '…nothing that New Zealand does in an agreement or a treaty with a third country combines Australia.'[96] In a supplementary submission to the Committee, the Attorney-General's Department reiterated its advice that New Zealand-third party co-productions are not covered by the CER Services Protocol. This is the approach that has been adopted by the ABA and the new draft Australian

---

91 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1998, Attachment D p 7

92 Government of New Zealand, second Submission to ABA review, 1988, p 3

93 Screen Producers and Directors Association [NZ], Submission no. 12 p 46

94 Federation of Australian Commercial Television Stations, Submission no. 25 Attachment (Submission to ABA, September 1998), p 10

95 Australian Film Commission, Submission no. 29 p 237

96 W Campbell (Attorney-General's Department), Evidence 4 December 1998 p 17 see also L Osborne (ABA), Evidence 4 December 1998 p 16

Content Standard excludes New Zealand/ third party co-productions. However, the ABA has indicated that it would be seeking a "side letter" [97] to the CER Protocol:

> The ABA has decided to retain official co-productions as a gateway by including them in the new part of the standard dealing with Australia's international obligations. The ABA will also be seeking a side letter to the CER protocol which excludes official New Zealand co-productions with countries other than Australia.[98]

See APPENDIX 10 for the Attorney General's Department advice on the issue of side letters.

2.86 The present position of the New Zealand government in relation to co-productions was put to the Committee thus:

> 'The view of the New Zealand government is simply that we are disappointed that New Zealand official co-productions will not be eligible for the quota.'[99]

2.87 In view of the level of concern in the industry revealed in submissions to the Committee and described in paragraphs 2.82 and 2.84, the Committee believes that every step should be taken to clarify the status of New Zealand/third party co-productions. Therefore,

Recommendation 4

The Committee recommends that on the question of New Zealand/third party co-productions, the government should negotiate with the New Zealand government with a view to exchanging side letters to the CER Services Protocol to clarify both countries' understanding of the meaning and application of the CER Services Protocol in relation to New Zealand/third party co-productions. The side letter should make it clear that New Zealand/third party co-productions would not be eligible for the purposes of the Australian Content Standard quotas.

---

97 Note re "side letter": The Attorney General's Department advised the Committee thus: "It is not uncommon for letters (usually referred to as 'side letters' if done at the time of treaty adoption, signature or ratification) to be exchanged between countries to record a common understanding of the meaning and application of particular provisions of treaties, particularly bilateral treaties such as the CER Services Protocol. Attorney-General's Department, Supplementary Submission no. 28 (b)

98 Australian Broadcasting Authority, *Review of the Australia Content Standard, Proposed Standard,* November 1998, Attachment D, p. 7

99 G Randal (New Zealand High Commission), Evidence 4 December 1998 p 18

CHAPTER 3

IMPLICATIONS OF REPEALING PARAGRAPH 160(D) OF THE BROADCASTING SERVICES ACT 1992

Should paragraph 160(d) be repealed?

3.1 The majority of submissions called for section 160(d) to be repealed and some argued that there do not seem to be other provisions as 'sweeping' as paragraph 160(d) in Australian law.[1] The Attorney-General's Department refuted this argument, citing s65(2) of the *Great Barrier Reef Marine Park Act 1975*.[2] The High Court's judgment lists 14 other Acts or regulations that have provisions 'similar' to paragraph 160(d).[3]

3.2 The Attorney General's Department submitted to the Committee that:

> The repeal of paragraph 160 (d) would not, in itself, involve a breach of international law. However, such a repeal could lead to Australia being placed in breach of its international obligations–for example, if the standard held unlawful by the High Court was to be re-made. Moreover, its removal would not be consistent with a policy of ensuring that Australia remains in compliance with its international obligations. Any amendment to section 160(d) should continue to ensure that Australia remains in compliance with its treaty obligations.[4]

3.3 The Department of Foreign Affairs and Trade (DFAT) stressed that repealing paragraph 160(d), though it might remove the problem that the present Standard is unlawful in Australian law, would *not* remove the diplomatic problem that the present Standard is inconsistent with Australia's obligations under the CER Protocol with New Zealand:

> '…the general position under international law [is] that a country cannot invoke the provisions of its internal law, or the lack of such provisions, as justifications for its failure to perform a treaty.'[5]

3.4 In DFAT's view, to repeal the paragraph would send a signal that Australia was contemplating abrogating its international commitments. This would be detrimental to Australia's standing in the international community.[6]

---

1 For example, Samara Films, Submission no. 9 p 68

2 Attorney-General's Department, Submission no. 28a p 1

3 *Project Blue Sky vs Australian Broadcasting Authority*, HCA 28 (28 April 1998), footnote 31

4 Attorney-General's Department, Submission no. 28a p 15

5 W Campbell (Attorney-General's Department), Evidence 4 December 1998, p 12

6 J Wise (Department of Foreign Affairs and Trade), Evidence 4 December 1998 p 12, 23

3.5 The New Zealand government submitted to the Committee:

> 'Any attempt to undermine Australia's CER obligations, and the High Court decision, would be greeted with considerable dismay in New Zealand, and by Australia's other friends in the international community.'[7]

3.6 The Committee agrees that Australia should abide by its international commitments. Accordingly, the Committee does not believe that repealing paragraph 160(d) would provide the optimum solution to the problem.

3.7 A Balance between Protecting Cultural Identity and the CER Protocol

3.8 It follows from the previous point that the only way to restore the ABA's freedom of action in relation to the Australian Content Standard, while being consistent with Australia's commitments under the CER Protocol, is to renegotiate the Protocol to include a cultural exemption. Several submissions advocated this approach.

3.9 FACTS for example told the Committee:

> 'It may prove to be the case that amendment to s.160(d), or renegotiation of relevant aspects of the CER, is the only practical way of ensuring that government policies in support of cultural objectives are not unacceptably constrained by the terms of the Services Protocol.'[8]

3.10 Some submissions argued that the lack of a cultural exemption when the CER Protocol was negotiated in 1988 was an honest mistake, which the government should now try to rectify:

> The fact is that when we entered into the trades and services protocol… there was very insufficient consultation with the industry and a misunderstanding of what we were signing up for… The government now realises how important it is to seek those exemptions… if one of the outcomes is to renegotiate the CER in order to make the removal of 160(d) consistent with our international obligations, then I think that is something which the government has to do.[9]

3.11 On the other hand the Department of Foreign Affairs and Trade, arguing that there is no need to renegotiate the Protocol, pointed out that the Explanatory Memorandum to the *BSA* bill in 1992 '… makes clear that s.160(d) was enacted to require the ABA as a statutory authority to act in conformity with Australia's

---

7 Government of New Zealand, Submission no. 24 p 152

8 Federation of Australian Commercial Television Stations, Submission no. 25 attachment (Submission to ABA review, September 1998), p 2

9 N Herd (Screen Producers Association of Australia), Evidence 4 December 1998 p 24,26

international obligations, in particular, with the 1988 Protocol…'[1011] The New Zealand government also argued that there was no oversight in 1988.[12]

3.12 FACTS took the view that the implications of section 160(d) was not clear to the legislators:

> Whatever the intentions of the Australian negotiators of the Services Protocol in 1988, the Protocol's implications for cultural policy regulation was at no time clearly conveyed to Parliament, to the Government agencies responsible for cultural policy regulation, or to vitally interested industry and community groups… the inclusion of s.160(d) in the new [Broadcasting Services] Act in 1992 did not serve to alert those interested parties to the Protocol's implications; the Explanatory Memorandum simply noted (page 80): 'Requires the ABA to perform its functions in a manner consistent with various matters, including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand.' This clause appears to have attracted no attention at all in the parliamentary passage of the legislation.[13]

3.13 In arguing that a cultural exemption should now be sought, submissions pointed to the cultural exemption sought by Canada in the North American Free Trade Agreement, and also to Australia's position in favour of cultural exemptions in more recent trade negotiations such as the General Agreement on Trade in Services (1995) and the Multilateral Agreement on Investment.[14] (Some further analogies are noted in APPENDIX 2)

3.14 The advantage of the examples mentioned above is that the issue of cultural exemption is being (or was) discussed before the signing of any Agreement. The problem facing the australian government in the current situation in relation to paragraph 160 (d) is that it faces the need to negotiate after the signing of the CER Protocol.

3.15 Not surprisingly, the New Zealand production industry argued that the CER Protocol should stand without prejudice to Australia's position in other future treaty negotiations:

> '…it is possible (and desirable) for Australia to ring-fence CER - as a pre-existing agreement- without implications for other international trade and trade policy interests Australia might wish to pursue.'[15]

---

10 Department of Foreign Affairs and Trade, Submission no. 35 p 1

11 See also J Wise (DFAT), Evidence 4 December 1998 p 22

12 G Randal (New Zealand High Commission), Evidence 4 December 1998 p 25

13 Federation of Australian Commercial Television Stations, Submission no. 25 p 154

14 Australian Film Commission, Submission no. 29 p 248-9

15 Screen Producers and Directors Association [NZ], Submission 12 p 42. Similarly G Randal (New Zealand High Commission), Evidence 4 December 1998 p 25

3.16 The Committee notes that the Department of Foreign Affairs and Trade stated in evidence that a change to the CER Protocol would require the consent of the New Zealand government, and said that '…such a move is not being contemplated by either government.'[16]

3.17 However, the Committee believes that the evidence put before it in this inquiry suggests that there are good reasons for the Australian government to seek to return to the negotiating table with New Zealand. The Committee notes the long-standing bipartisan political support for the Australian content rules on television. The Committee affirms the importance of the Australian content rules and their cultural objective. This is also the position of the government as stated in the Department of Communications, Information Technology and the Arts submission:

> The Government has recognised that it has an important and necessary role in creating an environment which encourages cultural development and provides greater opportunities for participation in, and access to, cultural activities for all Australians. Film and television product is subsidised for cultural reasons through a mix of direct subsidy and tax concessions. Content regulation complements these subsidies by ensuring that Australian audiences have access to that product.[17]

3.18 The Committee notes that several other countries have sought cultural exemptions in international trade agreements. The Committee affirms the importance of such exemptions. The Committee expects that the Australian government will maintain its insistence on cultural exemptions in future trade negotiations. Accordingly,

Recommendation 5

The Committee recommends that, in accordance with the Canadian precedent, an exclusion clause for cultural industries should be inserted in all future trade agreements with other countries.

Recommendation 6

The Committee recommends that the Department of Foreign Affairs and Trade examine the government's obligations under other treaties to which Australia is a party to, with a view to the government beginning negotiations to remove any possible applications to cultural industries.

---

16 J Wise (Department of Foreign Affairs and Trade), Evidence 4 December 1998 p 12

17 Department of Communications, information technology and the Arts, Submission no.32, p 4

3.19 In the case of the CER Agreement with New Zealand, the Committee believes that the Australian government should seek to reach an agreement with New Zealand on the issue of cultural exemption within the CER Protocol. Accordingly

Recommendation 7

The Committee recommends that the government approach the New Zealand government to seek an amendment to the Closer Economic Relations (CER) Protocol which would insert a "cultural industries clause" to exempt services relating to cultural industries from the Protocol.

Alan Eggleston

Chairman

AUSTRALIAN DEMOCRATS

Statement to the ECITA committee report into Section 160(d) of the Broadcasting Services Act.

15 February 1999

The Australian Democrats oppose any downgrading of the current Australian content standard, in terms of both drama and documentary programs.

Importance of Australian Content

The issue of content is also crucially important in our current television environment, but the decision to amend the standard will have serious long term implications. The evolution to digital broadcasting and other technological developments mean that content will be delivered in many different ways, across different media, and these should be protected. The decision on Australian content should not be made using assumptions made on the basis of current forms of analogue broadcasting. Australian content is going to become increasingly more important in the future, not less so, as new mediums of broadcasting services evolve.

We believe that the Governments, both of Australia and New Zealand should renegotiate the Protocol on Trade in Services to the Closer Economic Relations Trade Agreement in good faith, in order to exempt culture from this and other trade treaties. We do not believe amendment to the Australian content standard is in our national interest. We have received advice that amendment to the CER, as noted by the Department of Foreign Affairs and the Attorney General in their submissions, is the only way to proceed other than amending the Standard. We call on the Government to consider this course of action as the first and most important way to proceed on this matter.

The Australian Democrats are of the strong opinion that one of the most important elements of Australian television is its Australian content. As the majority report points out, television is one of our most important sources of information and entertainment. It has the power to influence public opinion, and has a key role to play in the promotion of Australian cultural identity. It reflects the tastes, concerns and aspirations of a multi-cultural society which is dynamic, changing, challenging and incredibly complex.

Anything that attempts to amend our current levels of Australian content seeks by implication, to downgrade the very important role television plays in maintaining our sense of ourselves. But not only is Australian content standard important in a cultural sense, it is also important is securing the ongoing viability of our film and television industry. Film and documentary makers, actors, writers, producers, and a host of supporting industries rely on product produced for Australian content standards. Job losses will surely result from any downgrading of the standard.

Everybody will remember the High Court judgment on Blue Sky where the High Court noted that one interpretation of the Act was that equal access might require 50 per cent of Australia's quota being given to New Zealand programs. Of course, if that happened, Australian audiences could see half of their favourite television programs disappear and be replaced by New Zealand programs. Even if that interpretation did not prevail, for every single New Zealand program that gets into the Australian quota there is one fewer Australian program.

In some categories, particularly children's drama, of which New Zealand is a significant producer and Australian networks are not noted for a willingness to pay high prices, one of the greatest fears is that Australian audiences might see all of their Australian children's drama disappear and be replaced by New Zealand programs. Arguably this has already happened in commercial television advertising, now deregulated.

The Australian content standard was written with a definite purpose in mind - to ensure that Australians will be able to hear our own voices and see our own stories and our own heroes in our largest mass medium. The history of Australian television demonstrates that, before the standard was introduced, there were very few Australian dramas, comedies, children's dramas or documentaries on commercial television. The success of programs like *Play School, Heartbreak High, Neighbours, Home and Away, Blue Heelers, Water Rats and Wildside*, are all built on that content standard.

Most countries in the world have local content quotas. They have them for the same reason we do: not to protect an industry but to preserve their own culture in the face of the enormous pressure from the largest producer of film and television and multimedia in the whole world - the United States. United States film and television is now that country's largest export industry. As an English language country, we are particularly vulnerable to that kind of cultural domination. This is particularly so in the case of third party co-productions, where programs produced and owned outside of New Zealand could conceivable be counted as New Zealand product, and therefore counted as Australian under the proposed changes.

There is no doubt that television, and its extension in the future digital age, will be the medium through which most Australians experience much of Australian culture. Our successful programs play an important role in reflecting and even in shaping our culture and our society. They help to promote a sense of unity, social cohesion and nationhood. These programs help to reiterate and reaffirm the fact that we are a fair and tolerant society which resolves its problems through the processes of justice and democracy.

When our television programs are seen in other countries, they show Australia to be a country which is modern, technologically advanced, safe, stable and democratic. That, of course, is of enormous benefit to trade and tourism.

The High Court '*Blue Sky*' decision was a warning. Our Australian standards are vulnerable. We cannot combine our culture with the culture of another country and still maintain the uniqueness of our own. Solving this dilemma is not a job for the Broadcasting Authority – it is the role of the Australian Parliament. Indeed, the

Australian Parliament has to approve of the Australian Broadcasting Authority's new standard.

The Australian government should move quickly to examine other international treaties to ascertain that other countries do not have rights over the introduction of their content under our own current standards. The Australian Government should make it perfectly clear that any amendment to current content standards are being made in relation to New Zealand only. The Government should move immediately to ensure that culture is exempt from all other bilateral and multilateral trade and service treaties

Committee recommendations:

Recommendation 7

This recommendation should be the immediate and urgent priority of the Australian Government. As stated, the Democrats are firmly of the opinion that the Government should seek to have the Trade in Services Protocol to the Closer Economic Relations Trade Treaty amended as the first and most important means to satisfy the High Court ruling on '*Blue Sky*' without undermining the current Australian Content standard under the Broadcasting Services Act.

Recommendation 1

The Democrats agree with this recommendation.

Recommendation 2

The ABA ought to commence monitoring the effect of changes to the content standard on the day any new standard comes into effect. It should report on the content standard under qualifications made by the Australian Parliament in its annual report. Two years is an arbitrary time frame.

The Australian Broadcasting Authority has stated it will monitor the revised standard after the first two years of completion. The ABA should commence monitoring immediately, and continue to provide a detailed annual analysis of how the standard impacts on the operation of the broadcasting industry. It should also report on the effect of the revised standard in relation to its Charter, which is to promote the role of Australian television to ensure it reflects a sense of Australian identity, character and cultural diversity. The new standards may not be consistent with this direction. Long term reporting is the only way to determine this outcome.

Recommendation 3

This recommendation should make it clear that the Minister should notify the ABA in writing of any obligations it has to international conventions, as per s580 of the Telecommunications Act.

Recommendation 4

The Democrats do not believe that third party co-productions should count as New Zealand product for the purposes of any amendment to the content standard to include New Zealand product. The product to be included should be fully owned and funded New Zealand product. Any letters of agreement should reflect this.

Recommendation 5

The Democrats agree with this recommendation. However, we are of the opinion that the recommendation should read: "…an exclusion clause for cultural industries should be inserted in all future trade **and service** agreements with other countries".

Recommendation 6

The Democrats agree with this recommendation.

Senator Lyn Allison

Australian Democrats

MINORITY REPORT BY ALP SENATORS ON AUSTRALIAN CONTENT REGULATION FOR COMMERCIAL TELEVISION BROADCASTERS

1. Introduction.

1.1 The importance of television as a medium for conveying society's culture, and its significant role in promoting Australia's cultural identity and developing the local production industry, is recognised through regulation of the Australian content of programming by the *Broadcasting Services Act 1997 (BSA)*. The consequence of the considerably higher cost of making local programs compared with that of importing programs with foreign content is that ratings are insufficient to ensure broadcasting of programs with Australian content.

1.2 The effect of the relevant content regulation has been diminished by the High Court decision in the *Project Blue Sky* case. There it was decided that s160(d) of the *BSA* requires that content regulations made by the ABA under section 122 of the *BSA* are subject to the Closer Economic Relations Trade Agreement (CER). This decision has the consequence of frustrating the objectives of the *BSA* by enabling New Zealand programs to qualify in fulfilment of Australian content quotas.

1.3 In order to ensure the important function of portrayal of Australian culture and identity is maintained the impact of this decision needs to be overcome. There are two ways in which this might be effectively achieved and the existing content rules thereby maintained. These potential solutions are considered below: 2.1 – 3.2.

2. ABA amendment of Content Standard.

2.1 The Government's preferred solution was to give the Australian Broadcasting Authority (ABA) the opportunity to amend the offending regulations, which action the ABA is presently attempting to undertake. The draft new Australian Content Standard released for public comment on 13 November 1998 by the ABA allows New Zealand programs to qualify for Australian content quotas equally with Australian programs. Clearly this action will not further the objects of the *BSA*, nor will it protect the social values upon which the legislation is founded.

2.2 The ECITA Committee suggests that the ABA state in the introduction to its new standard that Australian and New Zealand cultures are distinct, and that New Zealand productions are only given special status in order to comply with CER Protocol obligations.

2.3 It appears that the object of the *BSA* is difficult to reconcile with the provisions of s160(d), thus placing the ABA in a seemingly near impossible situation in complying with its obligations under s122 of the *BSA*. In light of the effect of the draft Content Standard, alternative solutions to enable effective content regulation need to be considered and the ABA should explore and exhaust every avenue to achieve this objective.

Recommendation 1

At first instance, Labor Senators prefer that the ABA redraft the new Australian Content Standard so that it achieves the purpose Australian Content Standards are intended to achieve.

3. Amendment of the Broadcasting Services Act 1997.

3.1 If the ABA proves unsuccessful in redrafting the Australian Content Standard to properly protect the cultural values that the *BSA* seeks to safeguard, a Labor Government would amend the *BSA* so that the ABA would be able to set effective Australian content rules.

3.2 The Australian film and television production industry supports repeal or effective amendment of s160(d) so that the forces of international trade do not determine issues of cultural policy. There are potentially 900 treaties which s160(d) would require the ABA to take into account when creating a standard. The Industry argues that certainty and an ability to properly regulate content require the repeal of s160(d), which presently precludes meaningful local content regulation. The impact of meaningless regulation is likely to be long-term erosion of true Australian content and a consequent diminution of the cultural values the *BSA* seeks to protect. Destruction of the Australian production industry is a possible consequence which could further impact upon the quality, volume and availability of Australian programs.

Recommendation 2

If Recommendation 1 is unachievable, it is recommended that the Government legislate to amend section 160(d) of the *BSA* to enable the ABA to continue to set effective Australian Content Standards.

4. Conclusion.

The crucial role of content regulation in protecting the expression of Australian culture is recognised by Labor Senators. The problems that the ABA is presently encountering in

attempting to regulate Australian content demand a prompt and effective solution. The alternative procedures outlined above are the avenues a Labor government would pursue to ensure resolution of the dilemma which threatens the important policy objectives that the *Broadcasting Services Act* seeks to achieve.

Senator Mark Bishop A.L.P. (W.A.)

Senator Nick Bolkus A.L.P. (S.A.)

APPENDIX 1 - OVERSEAS LOCAL CONTENT RULES

Extract from Australian Film Commission, submission 29, appendix 5

Europe

The main instrument of regulation is the European Council directive 'Television without Frontiers' of 1989 (Directive 89/552/EEC).

Article 4 requires that where practicable a majority of transmission time should be reserved for European programs. In addition, article 5 requires that at least 10 per cent shall be devoted to European work produced by independent producers.

From its monitoring the EC reported that the vast majority of broadcasters complied with both requirements.

The requirements set out in the European directive are the minimum to be adopted by the member states. Additional provisions that are not in conflict with the Directive may be implemented. Article 3 says member states are 'free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this directive.'

The following is a selection of countries where additional content regulation has occurred.

Denmark: at least 50 per cent of programs must be of Nordic origin (in addition to European directive).

France: 50 per cent of prime time (6pm to 11pm each day and 2pm to 6pm on Wednesday) must be original French language works and an additional 10 per cent must be works from European countries.

Italy: At least 50 per cent of all movies screened must be European, of which half must be Italian.

Spain: 51 per cent of transmission time must be for European works. At least half of the 51 per cent must be in Spanish or one of the other official languages of Spain.

United Kingdom: Non-European works are limited to less than 50 per cent of the broadcasting time. For Channel 3 (Independent Television Commission) 65 per cent of programs, including repeats, must be originally commissioned rather than acquired by the channel. Channel 3 licence specifies there must be minimum quantities of particular types of programs. Both Channel 3 and 4 have to devote a majority of their transmission time to European material, including 25 per cent of independently produced programs. Plus, there continues to be an implicit uncodified 86 per cent British quota (Jacka and Cunningham p127).

Canada: 60 per cent of total transmission time has to be Canadian. In addition there are Canadian content requirements for prime time (6pm to midnight) as follows: public licensees - 60 per cent; private licensees - 50 per cent.

Source: Franco Papandrea 1997, 'Cultural Regulation of Australian Television Programs', Bureau of Transport and Communications Economics, AGPS Canberra.

APPENDIX 2 - CULTURAL EXEMPTIONS IN INTERNATIONAL TRADE AGREEMENTS

Extract from Department of Communications, Information Technology and the Arts, submission 32, attachment C

General Agreement on Trade in Services (GATS)

An overwhelming majority of countries have resisted moves at international trade fora to liberalise trade in the audiovisual sector. A component of the General Agreement on Trade in Services (GATS), services in the audiovisual sector were a contested outcome of the Uruguay Round, concluded in 1993. The US, a net exporter of audiovisual services, sought the removal of restriction to the trade in audiovisual sector. While 125 member countries were covered by the outcome of the GATS negotiations, only fourteen countries made specific commitments in the audiovisual sector: Dominican Republic, Hong Kong, India, Israel, Japan, Kenya, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Singapore, Thailand and the USA. Of these only New Zealand and the USA committed to the removal of all regulatory barriers to trade in film and television industries.

Article IV of the GATT allows members to give preference to local film production. The GATS requires transparency of audiovisual sector regulation as for other services. However, Article IV is carried over if a country does not make a specific commitment for market access and national treatment. Significant opposition to the US push for liberalised trade came from European Union member states, particularly France, with participation from Canada, India, and Australia. Such countries listed broad exemptions to Most Favoured Nation treatment under the GATS, justified as measures promoting regional identity, cultural values and linguistic objectives.

Canada

Canada, whose broadcasting system is often compared with Australia's, has exempted cultural industries from its free trade agreements with the world's major television-producing nation, the US. Canada has exempted cultural industries from the Free Trade Agreement with the US and the subsequent North American Free Trade Agreement with the US and Mexico. The US has not exempted cultural industries from these agreements, but there is certainly no need to have local content quotas in the US as virtually all programming screened on American free-to-air television is produced under American creative control. Canada has a higher transmission quota than Australia (60 per cent of transmission time must be devoted to Canadian programming, whereas in Australia the transmission quota is currently 55 per cent).

European Union

In Europe, the European Union (EU) directive 'Television without Frontiers' came into effect in 1991, and sets a European transmission quota. The EU took an individual exemption from the audiovisual provisions of the General Agreement on

Trade in Services (GATS) adjunct to the GATT agreement reached in 1993 in order to preserve quota and other support schemes.

Australia

Australia has made no specific legally binding commitments to the audiovisual industry under the GATS, preserving the application of Australia's local content standards within the World Trade Organisation. Although it is possible that local content regulations will be raised in the next round of multilateral trade negotiations to start in the year 2000, particularly by the US, it is also possible that a number of territories will continue to exempt the audiovisual industries from the GATS.

APPENDIX 3 - NETWORK COMPLIANCE WITH THE AUSTRALIAN CONTENT STANDARD

Source: Australian Broadcasting Authority, *Review of the Australian Content Standard - discussion paper*, July 1998, attachment C

1. Australian Content Standard

	Transmission quota		**first release Australian drama**			
	1996	**1997**	**1996**		**1997**	
annual requirement	50 per cent	50 per cent	225 points		225 points	
compliance in -	per cent	per cent	Points	hours	points	hours
7 Network -						
ATN	56.4	52.7	335.69	253	263.93	188.17
HSV	57.35	56.01	334.63	244.9	259.93	186.17
BTQ	57.61	53.86	331.69	251	268.43	189.95
SAS	60.98	61.08	324.29	233.25	261.48	186.68
TVW	60.54	58.95	327.69	245.15	267.82	190.13
9 Network -						
TCN	60.6	62.9	268.7	149.6	272	124.8
GTV	59.1	60.0	271.7	149.9	269.6	124
QTQ	62.5	63.5	270.8	148.8	270.8	124.2
10 Network -						
TEN	51.32	50.9	248.4	183	266.5	189.5
ATV	51.32	50.9	248.4	183	266.5	189.5
TVQ	51.32	50.9	248.4	183	266.5	189.5
ADS	51.32	50.9	248.4	183	266.5	189.5
NEW	51.32	50.9	248.4	183	266.5	189.5

	first release Australian documentary		**first release Australian children's drama**	
	1996	**1997**	**1996**	**1997**
annual requirement	10 hours	10 hours	24 hours	28 hours
compliance in -	hours	hours	hours	hours
7 Network -				
ATN	20	34	24	27.5
HSV	20	42	24	27.5
BTQ	19	32.5	24	27.5
SAS	17	34.5	24	27.5
TVW	19	35	24	27.5
9 Network -				
TCN	19.5	24	24	28
GTV	19.5	23	24	28
QTQ	19.5	27	24	28
10 Network -				
TEN	10	10.5	24.25	28
ATV	10	10.5	24.25	28
TVQ	10	10.5	24.25	28
ADS	10	10.5	24.25	28
NEW	10	10.5	24.25	28

2. Children's Television Standards

	Australian C classified		**C classified**		**Australian P classified**	
	total hours 1st release		total hours		total hours	
	1996	**1997**	**1996**	**1997**	**1996**	**1997**
annual requirement	130	130	260	260	130	130
compliance in -	hours	hours	hours	hours	hours	hours
7 Network -						
ATN	144	134.0	261	261.5	131	130.5
HSV	144	134.5	261	262.5	131	130.5
BTQ	144	134.0	261	262.5	131	130.5
SAS	144	134.5	260.5	263.0	131	130.5
TVW	144	135.0	261	262.5	131	130.5
9 Network -						
TCN	133	133.5	268.5	271.5	131	130.5
GTV	133.5	134	269.5	271.5	131	130.5
QTQ	133	133.5	269	272	131	130.5
10 Network -						
TEN	160.25	131.5	306.75	282.5	131	130.5
ATV	160.25	131.5	306.75	282.5	131	130.5
TVQ	160.25	131.5	306.75	282.5	131	130.5
ADS	160.25	131.5	306.75	282.5	131	130.5
NEW	160.25	131.5	306.75	280.5	131	130.5

APPENDIX 4 - HOURS OF NEW ZEALAND PROGRAMS ON NEW ZEALAND TELEVISION

Extract from Australian Film Commission and others, submission to ABA review of the Australian Content Standard, 1998, appendix 6, sourced from New Zealand On Air, Local Content Research New Zealand Television 1995, p4,15

program type	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1997 1st release
drama/comedy	39	59	55	86	223	264	283	357	357	335	170.88
sport	509	691	1653	1283	1735	1075	1531	1545	1077	865	864
news & current affairs	550	709	997	924	1009	1023	1087 8	1045	1198	1440	1437.5
entertainment	292	458	528	525	886	588	364	454	302	482	230.08
children's	325	440	534	739	1264	1019	861	745	745	806	366.58
children's drama	12	21	25	20	33	27	2	28	12	0	
Maori	131	144	143	111	163	170	156	173	173	256	181
documentaries	43	36	107	139	175	190	207	257	252	269	189.01
information	213	253	208	213	226	431	477	415	867	1147	771.77
total NZ content	2112	2804	4249	4039	5715	4788	4969	5018	5066	5601	4210.85
% of schedule	23.9	31.8	24.2	31.7	30.2	23.2	23.2	19.7	19.2	21.3	16.0
total 1st release NZ in prime time	686	943	1189	1281	1640	1769	1821	1546	1586	1636	
% of prime time	23.5	21.6	27.2	29.3	37.5	40.5	41.7	35.4	35.4	37.5	

'Figures for 1988-96 are all programs including first release and repeats. 1997 total figures and first release are shown separately.

'New Zealand On Air came into existence in 1989.'

APPENDIX 5 - EXPENDITURE BY COMMERCIAL TELEVISION ON AUSTRALIAN PROGRAMS

Extract from Australian Film Commission and others, submission to ABA review of the Australian Content Standard, 1998, appendix 1, sourced from Australian Broadcasting Authority Financial Results 1996/97

	1992/93	1993/94	1994/95	1995/96	1996/97	change 95/96-96/97
Aust. drama	89.0	72.66	72.8	77.2	73.8	- 4.4%
children's drama	4.4	3.0	4.4	7.0	7.8	+ 11.3%
documentaries	17.9	19.3	24.0	24.0	13.3	- 44.7%
total Australian	**517.6**	**469.9**	**477.4**	**504.0**	**549.6**	**+ 9.0%**
foreign drama	164.9	160.9	183.4	174.2	199.6	+ 14.6%
total OS	**183.2**	**184.1**	**200.6**	**196.5**	**214.9**	**+ 9.4%**
total spending	**700.7**	**654.0**	**678.0**	**700.6**	**764.5**	**+ 9.1%**

'Note: The figures for children's drama in 1995/96 reflects the increases in the children's drama quota introduced then. Prior to 1996 the requirement for first release children's drama was 16 hours and there was no requirements as there is now for 8 hours of repeat children's drama.'

APPENDIX 6 - NEW ZEALAND ON AIR SUBSIDIES TO TELEVISION PRODUCTION

Extract from Australian Film Commission and others, submission to ABA review of the Australian Content Standard, 1998, appendix 7, sourced from New Zealand On Air annual reports 1994/95, 1995/96, 1996/97

1. New Zealand On Air Program Funding 1995/96 and 1996/97

	hours	96/97 funding ($000)	% of total production cost	hours	95/96 funding ($000)	% of total production cost
drama/comedy	62	15,998	55%	77	13,914	60%
Documentaries	99	9,758	62%	107	9,329	71%
children and young persons	410	10,790	78%	391	9,179	79%
special interest programs	204	10,790	85%	247	11,755	80%
total production funding	775	44,841		822	44,177	
plus development funding		260			751	
total television funding		45,101			44,928	

2. New Zealand On Air subsidised television program funding 1990-1997 (hours)

program type	1990	1991	1992	1993	1994	1995	1996	1997
Drama	49	77	187	213	229	218	77	62
Documentaries	60	119	112	214	200	169	107	103
children's	162	283	410	447	476	469	391	410
Maori	74	118	145	118	116	n/a	n/a	n/a
special interest	189	91	90	134	148	210	247	204
Total	534	688	944	1126	1169	1066	822	779

'Note: Since 1994 most support for Maori programming has been through NZ On Air to Te Manga: Paho, the separate and independent Maori broadcasting funding agency - hence these figures are not now published in NZ On Air Annual Reports.'

APPENDIX 7 - COMPARISON OF AUSTRALIAN AND NEW ZEALAND SUBSIDIES TO TELEVISION PRODUCTION

Extract from Australian Broadcasting Authority, Review of the Australian Content Standard - discussion paper, July 1998, attachment H

Australian Film Finance Corporation (FFC)

Established in 1988, the Australian Film Finance Corporation (FFC) provides financial support for Australian feature films, telemovies, mini series and documentaries. Assistance is targeted to documentary, children's and adult drama categories as these programs are perceived to be more important for delivering outcomes in terms of the cultural objective. Series and serials are not funded. While the FFC generally invests in television documentaries, it does not invest in other actuality programs such as infotainment, current affairs, cooking, how to or sports programs. In allocating subsidies, the FFC looks to the level of non-FFC participation, the level and appropriateness of marketplace participation, recoupment prospects for the FFC and other criteria under its guidelines.

New Zealand on Air (NZOA)

New Zealand on Air (NZOA) was established in 1989. In accordance with the Broadcasting Act, NZOA is required to reflect and develop New Zealand identity and culture by promoting programs about New Zealand and New Zealand interests, and promoting Maori language and Maori culture.

In terms of television, NZOA aims to ensure a diverse range of New Zealand programs remain part of the main television schedules. NZOA emphasises three genres - documentaries, drama programs and programs for special interest groups. The categories of programs funded by NZOA are broader than those of the FFC and include information, documentaries, Maori programs, children's drama and entertainment, news/current affairs, sports, drama and comedy.

NZOA only funds programs that will have a broadcast audience and to an extent, NZOA targets high rating programs so that around 60 percent of the funding for television is for prime time programs (between 6.00 p.m.-10.30 p.m.). The funding offered by a broadcaster is generally considered important. NZOA is rarely the sole funder. NZOA, like the FFC, invests in programs and benefits from any profit made on the programs. In assessing funding applications, NZOA also considers how well the program reflects the diverse nature of the New Zealand population and its culture, and the key personnel involved in the production.

Preliminary assessment of direct subsidy levels in Australia and New Zealand

NZOA annual reports over the last five years to 1996-97, provide lists of the categories of television programs funded during the relevant financial year, the amount of NZOA funding for each program and NZOA funding as a percentage of the total cost of all programs in a particular category. The general levels of subsidy provided by the FFC are set out in the FFC's guidelines. The FFC subsidy as a proportion of the total budget for particular program categories has been calculated using information from FFC annual reports over the last five years. The following table outlines the different subsidy levels reported by FFC and NZOA.

The fact that NZOA subsidises a wider range of programs than the FFC makes it difficult to draw direct conclusions about the relative level of subsidies provided.

Subsidies as a percentage of total program costs - AUSTRALIA (FFC)					
program genre/format: FFC guidelines	1992/93	1993/94	1994/95	1995/96	1996/97
adult drama: miniseries, telemovies; generally not more than 60 %, with 50 % desirable level	50%	57%	57%	57%	39%
documentaries: non-accord documentaries: 60 % (may be higher with lower budget production) accord documentaries: ABC: up to 16x1hr programs, budgets up to $300k, cash presale of 30% of budget. SBS: up to 10x1hr programs, budgets up to $200k, cash presale of 30% of budget	72%	64%	66%	50%	67%
children's programs: generally only miniseries of 13x30minutes: generally not more than 50% of the budget	62%	69%	53%	60%	33%
Subsidies as a percentage of total program costs - NEW ZEALAND (NZOA)					
program genre/format	1992/93	1993/94	1994/95	1995/96	1996/97
comedy and drama	36%	49%	36%	60%	55%
documentary programs	68%	50%	62%	71%	62%
drama and entertainment	63%	72%	71%	79%	78%

'Note:
Documentaries under the FFC guidelines are either accord documentaries financed through a pre-existing arrangement with a local broadcaster ('an accord'), or non-accord documentaries which are one-off projects commissioned by broadcasters outside the terms of the accords. The FFC has accords with the ABC and SBS but has no formal accord with networks Seven, Nine and Ten. Accord requirements vary. Most documentaries financed by the FFC are produced under an accord. Only two non-accord documentaries have been funded by the FFC in recent years.

'In addition to the program categories in the table, NZOA subsidises special interest programs (eg cultural and arts programs). It appears that these types of programs are similar to those funded by Australian public broadcasters. In 1996-97, for example, NZOA funded 85 per cent of the total production costs of special interest programs. The FFC does not fund this category of programs.'

APPENDIX 8 - LIST OF SUBMISSIONS

1	NSW Writers' Centre Inc
2	Mr Julian Pringle
3	Light Source Films Pty Ltd
4	Mr David Muir
5	Mr Desmond Tsui
6	Bower Bird Films
7	Red Productions
8	Ms Glenda Hambly
9	The Funny Farm Pty Ltd
10	Mr John Cundill
11	Piccolo Films Pty Ltd
12	Screen Producers and Directors Association
13	Mr Richard Sarell
14	Ms Lucy Freeman
15	Journocam Productions
16	Samara Films
17	Media Entertainment and Arts Alliance
18	Ms Sonia Borg, AM
19	Film Positive Pty Ltd
20	Michelle MacEwan and Wim Bezemer
21	Gil Scrine Films
22 & 22a	Screen Producers Association of Australia
23 & 23a	The Australian Children's Television Foundation
24	New Zealand Government
25 & 25a	Federation of Australian Commercial Television Stations

26	Young Media Australia
27 & 27a	Australian Screen Directors Association Limited
28, 28a & 28b	Attorney General's Department
29, 29a & 29b	Australian Film Commission
30	Australian Writers' Guild
31	Australian Film Finance Corporation Limited
32	Department of Communications, Information Technology and the Arts
33	Australian Teachers of Media (NSW)
34	Film Australia
35	Department of Foreign Affairs and Trade
36	Australian Screen Culture Industry Association
37	Screen Producers Association of Australia - Western Australian Chapter

APPENDIX 9 - WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Friday 4 December 1998, Committee Room 2S3, Parliament House, Canberra

NSW Writers' Centre

Mr GG Masterman, QC, Committee Member

Screen Producers and Directors Association (New Zealand)

Ms Jo Tyndall, Project Blue Sky

Media Entertainment and Arts Alliance

Ms Anne Britton, Joint Federal Secretary

Screen Producers Assn of Australia

Mr Nick Herd, Executive Director

Ms Adrianne Pecotic, General Manager, Grundy Organisation

Australian Children's Television Foundation

Ms Pia De Mattina, Corporate Lawyer

New Zealand Govt

Mr Geoff Randal, Deputy High Commissioner

Dr Trevor Matheson, Counsellor

Federation of Australian Commercial Television Stations (FACTS)

Mr Tony Branigan, General Manager

Young Media Australia

Ms Toni Jupe, Communications and Media Manager

Australian Screen Directors Association

Mr Richard Harris, Executive Director

Australian Broadcasting Authority

Ms Lesley Osborne, Manager Standards

Ms Andree Wright, Director, Policy and Program Content

Ms Maria Vassiliadis, Lawyer

Attorney General's Department

Mr Bill Campbell, First Assistant Secretary, Office of International Law

Mr Mark Zanker, Assistant Secretary

Australian Film Commission

Ms Kim Ireland, Policy Adviser

Australian Writers' Guild

Ms Sue McCreadie, Executive Director

Australian Film Finance Corporation

Mr Michael Ward, Policy Manager

Department of Foreign Affairs and Trade

Mr James Wise, AS, New Zealand and Papua New Guinea Branch

Ms Marina Tsirbas, Acting Director, Treaties Secretariat

Department of Communications, Information Technology and the Arts

Ms Megan Morris, Assistant Secretary, Film Branch

Dr Beverly Hart, Assistant Secretary, Licenced Broadcasting Branch

Mr Rohan Buettel, Assistant Secretary, Legal, Parliamentary and Corporate Branch

Dr Alan Stretton, First Assistant Secretary, Film, Public Broadcasting and Intellectual Property Division

APPENDIX 10 - COPY OF ADVICE ON SIDE LETTER FORM THE ATTORNEY GENERAL'S DEPARTMENT

ATTORNEY GENERAL'S DEPARTMENT

OFFICE OF INTERNATIONAL LAW

3 February 1999

Ms Roxane Le Guen

Secretary

Environment, Communications, Information

Technology and the arts Legislation Committee

Parliament House

CANBERRA ACT 2600

Dear Ms Le Guen

REFERENCE CONCERNING PARAGRAPH 160 (d) OF THE BROADCASTING SERVICES ACT 1997

I refer to your letter dated 2 February 1999 concerning the possibility of using a side letter to clarify certain issues relating to the Closer Economic Relations ('CER') Services Protocol with New Zealand. You state that the Committee would be grateful for advice on the status of a side letter and the way in which such a letter is usually used in relation to treaties.

2 I understand that at least one of the issues which is anticipated could be clarified by an exchange of (side) letters would be the status of New Zealand co-productions with third countries under the CER Services protocol. The exchange would be intended to embody a proposed common understanding with New Zealand that New Zealand –third country co-productions are not covered by the CER Services Protocol. In this respect I note that at page 17 of the Hansard record of the 4 December 1998 hearing of the Committee, I gave evidence which would support the proposition that New Zealand-third country

co-productions would not be a New Zealand service for the purposes of the CER Services Protocol. If that view is correct, then there would be no need for an exchange of letters. However, others appearing before the Committee took a different view. Certainly, the Australian Broadcasting Tribunal, both in its evidence before the Committee, and in its November 1998 review (Attachment D; paragraph 5), supports the use of a 'side letter'. In that report it states 'the ABA will also be seeking a side letter to the CER Protocol which excludes official New Zealand co-productions with countries other than Australia.'

3. I assume that the letter referred to would be one to be exchanged between Australia and New Zeland. It is not uncommon for letters (usually referred to as 'side letters' if done at the time of treaty adoption, signature or ratification) to be exchanged between countries to record a common understanding of the meaning and application of particular provisions treaties, particularly bilateral treaties such as the CER Services Protocol. Those letters would not normally be of treaty status (unless couched in mandatory language) but would have considerable influence over the subsequent interpretation of the treaty. This follows Article 31 of the Vienna Convention on the Law of Treaties.

4. Article 31.1 of the Vienna Convention provides:

'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

In relation to letters exchanged after a treaty enters into force, Article 31.3 is relevant and states, in part, as follows:

'There shall be taken into account, together with context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

5. The type of letter to which you refer could fall within either one or both of paragraphs 3 (a) and (b) of Article 31. In short, an exchange of letters between the two countries evidencing a common understanding of the application of a provision of a bilateral treaty, while not binding in and of itself, would normally be followed in any subsequent application of the treaty. The form

and content of any side letter would be the subject of discussion with the Department of Foreign Affairs and Trade.

6. It is important to note that it is an exchange of letters which gives rise to a common understanding. It is not simply a matter of one country unilaterally sending its views to the other. Therefore, use of this mechanism in relation to the interpretation and application of the CER Services Protocol would require the participation of New Zealand. A refusal by New Zealand to participate in such an exchange might indicate that it does not agree with the interpretation which would be the subject of the proposed exchange.

7. I trust the above information will be of assistance to the Committee.

Yours sincerely

Bill Campbell

First Assistant Secretary